

# **DEATH PENALTY BENCHGUIDE: PENALTY PHASE AND POSTTRIAL**

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ADMINISTRATIVE OFFICE  
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# DEATH PENALTY BENCHGUIDE: PENALTY PHASE AND POSTTRIAL

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The major portion of this benchguide (Part II, §§99.2–99.130) deals with the penalty phase of a death penalty trial. Part III (§§99.131–99.160) covers posttrial matters, particularly the automatic motion for modification of a verdict of death and postconviction discovery. The benchguide concludes with a death sentence script (§99.163) and an example of a court’s statement of reasons in ruling on the automatic motion to modify the verdict (§99.164). For certification of the record, see Supreme Court of California Office of the Clerk/Administrative Office of the Courts, *Death Penalty Appeals: Preparation and Certification of the Record*.

## II. PENALTY PHASE

### A. [§99.2] Checklist: Procedural Matters Between Completion of Guilt Phase and Start of Penalty Phase Testimony

(1) *Set date for start of penalty phase trial.* Most judges schedule the penalty phase a week or two after the conclusion of the guilt phase. This interval gives jurors and others an opportunity to recuperate from the strain of the guilt phase, and it allows time for motions and lets counsel complete preparations for the penalty phase.

- ☛ JUDICIAL TIP: The interval between the guilt and penalty phases should usually not exceed two weeks; many judges recommend a maximum of one week.

(2) *Resolve any requests related to representation.* It is not uncommon for a defendant who has just been convicted of special circumstances murder to blame defense counsel for the result and to ask the court to appoint new counsel or permit self-representation. See, e.g., *People v Hardy* (1992) 2 C4th 86, 193, 5 CR2d 796. A *Faretta* motion made at this stage is untimely (see *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562); the court has discretion whether to grant it. *People v Hardy*, *supra*; see California Judges Benchguide 54: *Right To Counsel Issues* §§54.9–54.10 (Cal CJER).

#### ☛ JUDICIAL TIPS:

- In assessing defendant's request concerning representation, consider:
  - The quality of representation to date;
  - Defendant's prior proclivity, if any, to substitute counsel;
  - The reasons for the request; and
  - The disruption or delay likely to ensue if the request is granted. *People v Hardy*, *supra*, 2 C4th at 195; *People v Windham* (1977) 19 C3d 121, 128, 137 CR 8.
- Denial of a belated *Faretta* motion should not be based on the fact that defendant is facing a possible death sentence. See *People v Hardy*, *supra*, 2 C4th at 196; *People v Joseph* (1983) 34 C3d 936, 944–945, 196 CR 339. However, this fact is an important consideration when defendant makes the converse request, i.e., to end self-representation and to have counsel appointed.
- The motion should probably not be denied on the grounds that the defendant expressed a wish to receive the death penalty and stated he would not cross-examine or present mitigating evidence. See *People v Thompson* (2010) 49 C4th 79, 132, 109 CR3d 549. The

appointment of standby counsel is especially important in such a situation.

- Requests by pro pers for counsel at this stage are not uncommon and constitute a major reason for appointing standby counsel before the start of the guilt phase. See California Judges Benchguide 98: *Death Penalty Benchguide: Pretrial and Guilt Phase* §§98.7–98.8 (Cal CJER).

(3) *When jury is waived, obtain a waiver from defendant, defense counsel, and prosecutor, even if there were waivers at earlier stages of the case.* A jury waiver for one phase of a death penalty trial is not effective for any other phase. [Pen C §190.4\(a\)–\(b\)](#); *People v Turner* (Turner II) (2004) 34 C4th 406, 419, 20 CR3d 182; *People v Memro* (Memro I) (1985) 38 C3d 658, 700, 701, 214 CR 832. A waiver is not effective over the prosecution’s objection. *People v Memro* (Memro II) (1995) 11 C4th 786, 875, 47 CR2d 219.

(4) *Hear and decide motion that the penalty phase be heard by a new jury or that additional voir dire be permitted.* See §99.7.

(5) *Hear and decide in limine and other motions concerning the admissibility of penalty phase evidence.* Prominent among such motions is likely to be a motion “to determine whether there is substantial evidence to prove each element” of defendant’s other violent criminal conduct under [Pen C §190.3\(b\)](#), so-called factor (b) evidence. *People v Phillips* (1985) 41 C3d 29, 72 n25, 222 CR 127; *People v Thompson* (1988) 45 C3d 86, 127, 246 CR 245. For checklist, see §99.32. For a prosecutor’s in limine motion, see, e.g., *People v Koontz* (2002) 27 C4th 1041, 1089, 119 CR2d 859 (motion to preclude defendant from mentioning that he had or was willing to take lie detector test).

#### 🔑 JUDICIAL TIPS:

- A *Phillips* hearing is not mandatory (*People v Clair* (1992) 2 C4th 629, 677, 7 CR2d 564), but most judges regard it as desirable to resolve major evidential issues in advance to minimize trial interruptions and problems such as remarks in the prosecutor’s opening statement that cannot be substantiated because of subsequent rulings. See *People v Frank* (1990) 51 C3d 718, 727, 274 CR 372. For a checklist to determine the admissibility of factor (b) evidence, see §99.32.
- The hearing need not be evidentiary; it may be based on an offer of proof. *People v Jones* (2011) 51 Cth 346, 380, 121 CR3d 1.
- Some judges prefer to hold the *Phillips* hearing at the start of the guilt phase before jury selection.

- A *Phillips* hearing is not always necessary. See *People v Arias* (1996) 13 C4th 92, 167 n29, 51 CR2d 770. It is particularly useful when there is evidence of threats of violence that may not amount to a crime. See §§99.32–99.34.

(6) *Obtain stipulation or make it clear to counsel whether further objection is necessary when evidence ruled admissible is later presented.* *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720.

(7) *Hear and decide other motions related to the penalty phase.* Typical motions seek to preclude certain arguments to the jury (see §§99.76–99.97 on argument). Constitutional challenges are also often made, largely to protect the record. See, e.g., *People v DePriest* (2007) 42 C4th 1, 58, 63 CR3d 896 (listing challenges previously rejected); *People v Abilez* (2007) 41 C4th 472, 533, 61 CR3d 526.

(8) *Resolve disputes about instructions* (see §§99.98–99.130), *adopt final form of instructions, and arrange for reproduction.*

- ➡ JUDICIAL TIP: It is a good idea to inform counsel early whether the court will reread instructions given at the guilt phase that apply in the penalty phase. See §§99.98–99.99.

(9) *Advise counsel of the order of argument and any time limits.*

- ➡ JUDICIAL TIP: There are usually two or four penalty phase arguments; the prosecutor does not get the last word. See §99.13.

## B. Statutory Framework

### 1. [§99.3] Mitigating and Aggravating Factors

**Penal Code §190.3** calls for an evidentiary hearing on whether the penalty will be death or life without possibility of parole (LWOP). The statute includes 11 mitigating and aggravating circumstances, usually called factors (a)–(k), that are to guide the decision:

- Factor (a): Circumstances of the crime(s) and special circumstances of which defendant was convicted during the guilt phase. See §§99.26–99.31.
- Factor (b): Other violent criminal activity. See §§99.32–99.45.
- Factor (c): Prior felony convictions. See §§99.46–99.52.
- Factor (d): Extreme mental or emotional disturbance. See §99.53 for discussion of factors (d)–(j).
- Factor (e): Victim’s participation or consent.
- Factor (f): Defendant’s reasonable belief that conduct was justified or extenuated.
- Factor (g): Extreme duress.

- Factor (h): Diminished capacity as a result of mental illness or intoxication.
- Factor (i): Age of defendant at time of crime.
- Factor (j): Defendant was an accomplice and a relatively minor participant.
- Factor (k): Any other circumstance extenuating the gravity of the crime. See §99.54–99.64.

The statute does not identify any factor as mitigating or aggravating, and jury instructions need not do so. See §99.110. However, as a matter of law, certain factors can be considered only in mitigation. *People v Cox* (1991) 53 C3d 618, 674, 280 CR 692. The mitigating factors are (d)–(h) and (k). *People v Morrison* (2004) 34 C4th 698, 728, 21 CR3d 682; see *People v Whitt* (1990) 51 C3d 620, 654, 274 CR 252 (factors (e) and (k) evidence can only mitigate; therefore, prosecutor cannot argue that absence of such evidence is aggravating). See also §99.76.

Factor (i)—age—is neither aggravating nor mitigating by itself; the parties are free to argue inferences related to age and maturity. *People v Arias* (1996) 13 C4th 92, 188, 51 CR2d 770; *People v Hawthorne* (1992) 4 C4th 43, 77, 14 CR2d 133; see *Tuilaepa v California* (1994) 512 US 967, 967–968, 114 S Ct 2630, 129 L Ed 2d 750. Factor (j)—defendant as accomplice—is mitigating; the courts have not decided whether it is also aggravating when the defendant acted alone. See *People v Carpenter* (1997) 15 C4th 312, 414–415, 63 CR2d 1 (jury can consider this under factor (a)).

Factor (a) can be either aggravating or mitigating (see *People v Pollock* (2004) 32 C4th 1153, 1189, 13 CR3d 34; *Tuilaepa v California, supra*), although victim impact evidence admitted under factor (a) is obviously aggravating, as is the presence of circumstances specified by factors (b) and (c).

## 2. [§99.4] Weighing Process

Penal Code §190.3 says that when the jury (or court) concludes that the aggravating circumstances outweigh the mitigating circumstances, it “shall impose” a sentence of death. Conversely, when mitigating circumstances outweigh aggravating circumstances, the trier of fact “shall impose” a sentence of LWOP.

These provisions do not call for a mechanical counting of factors or an arbitrary assignment of weights to each of them. On the contrary, each juror is free to assign whatever moral or sympathetic value he or she considers appropriate to each relevant factor. The weighing process does not require a juror to vote for the death penalty unless he or she is convinced “that death is the appropriate penalty under all the

circumstances.” *People v Bacigalupo* (Bacigalupo II) (1993) 6 C4th 457, 470, 24 CR2d 808; *People v Brown* (1985) 40 C3d 512, 541, 230 CR 834. Penalty determination is a normative task and jurors may consider their own personal religious, philosophical, or secular values in performing it. *People v Danks* (2004) 32 C4th 269, 311, 8 CR3d 767. A juror may not, however, circulate or read Bible passages during deliberations. *People v Williams* (2006) 40 C4th 287, 333, 52 CR3d 268.

- ☛ JUDICIAL TIP: This is a recurrent problem (see, e.g., *People v Williams*, *supra*; *People v Danks*, *supra*, and *Fields v Brown* (9th Cir 2007) 503 F3d 755. An admonitory instruction may be helpful to reduce the risk of such juror misconduct.

The jury may impose LWOP even in the absence of mitigating evidence. *People v Duncan* (1991) 53 C3d 955, 979, 281 CR 273.

As to jury unanimity, see §99.18; as to instructing in the statutory language that the jury “shall impose” a death sentence, see §99.113.

## C. Procedural Aspects

### 1. Jury Trial

#### a. [§99.5] Nature of Right to Jury Trial of Penalty Phase

The right to a jury determination of the penalty is statutory, not constitutional. *Spaziano v Florida* (1984) 468 US 447, 448, 104 S Ct 3154, 82 L Ed 2d 340; Pen C §190.4(c).

One consequence of the lack of a Sixth Amendment right to jury sentencing is that the jury need not agree on the presence of any particular aggravating factor. *People v Bacigalupo* (1991) 1 C4th 103, 147, 2 CR2d 335; see discussion in §99.17.

#### b. [§99.6] Guilt Phase Jury Hears Penalty Phase; Exceptions

The same jury that heard the earlier stages of the trial also hears the penalty phase. Pen C §190.4(c). There are three infrequent exceptions:

- (1) After the grant of a motion for a second jury. See §99.7.
- (2) On stipulation. *People v Beardslee* (1991) 53 C3d 68, 102, 279 CR 276.
- (3) At a penalty phase retrial following a hung jury (Pen C §190.4(b); *People v Thompson* (1990) 50 C3d 134, 176, 266 CR 309 (retrial after first deadlock mandatory)) or reversal. After two jury deadlocks, the court may order a third jury or impose an LWOP sentence. Pen C §190.4(b). The defendant may waive a jury in a penalty retrial. *People v Hovarter* (2008) 44 C4th 983, 1024, 81 CR3d 299.

### c. [§99.7] Motion for Second Jury

The court may order a second jury for good cause. [Pen C §190.4](#). Good cause has not been defined; decisions suggest a limited meaning. See *People v Gates* (1987) 43 C3d 1168, 1199, 240 CR 666 (jury's inability, appearing on the record, to perform its functions); in accord are *People v Taylor* (2001) 26 C4th 1155, 1170, 113 CR2d 827; *People v Earp* (1999) 20 C4th 826, 891, 85 CR2d 857.

The following are not good cause:

- Studies showing that death-qualified juries are more likely to convict. *People v Williams* (2009) 46 C4th 539, 625, 94 CR3d 322.
- The inflammatory nature of guilt phase evidence. *People v Malone* (1988) 47 C3d 1, 27, 252 CR 525 (not even good cause for re-examining the jurors).
- A change in defense strategy between the two phases. *People v Bennett* (2009) 45 C4th 577, 599–600, 88 CR3d 131 (during guilt phase defendant urged reasonable doubt; in penalty phase defendant planned to admit guilt); *People v Pride* (1992) 3 C4th 195, 252, 10 CR2d 636; see *People v Yeoman* (2003) 31 C4th 93, 119, 2 CR3d 186 (defense counsel's desire to voir dire one way for guilt phase and another for penalty phase not good cause).
- Publicity about crime and media criticism of the courts. *People v Gates, supra* (not good cause for re-voir dire).
- Acquittal of defendant on some of the charges. *People v Bonillas* (1989) 48 C3d 757, 786, 257 CR 895.
- A charge of a prior murder special circumstance. *People v Catlin* (2001) 26 C4th 81, 113–115, 109 CR2d 31.
- Jury had found defendant guilty after deliberating less than two hours. *People v Williams* (1997) 16 C4th 153, 229, 66 CR2d 123 (not good cause for reopening voir dire).
- Prosecutor implied during guilt phase that defense contentions were recent fabrications; prosecutor had also insinuated that defense team suborned perjury. *People v Earp, supra*.
- Expert opinion that the guilt phase jury is less able to give defendant a fair trial on penalty than a new jury. *People v Kraft* (2000) 23 C4th 978, 1069, 99 CR2d 1 (testimony applies to capital cases generally, rather than to particular defendant).
- Court's discharge of defense counsel after guilt phase and appointment of new counsel. *People v Taylor* (2001) 26 C4th 1155, 1170, 113 CR2d 827.

- Delay between guilt and penalty phases, unless the record indicates that the delay prejudiced the defendant. *People v Taylor, supra*.
- Jury had heard that defendant was sentenced to death in a previous trial. *People v Ledesma (Ledesma II)* (2006) 39 C4th 641, 732, 47 CR3d 326.

Courts stress that Pen C §190.4(c) expresses a clear mandate that both guilt and penalty phases be tried by the same jury in order to serve important interests. *People v Beardslee* (1991) 53 C3d 68, 102, 279 CR 276; *People v Fields* (1983) 35 C3d 329, 351–352, 197 CR 803. Motions for a second jury or for permission to reexamine the guilt phase jury are rarely granted. The court may consider the motion prior to trial or at the conclusion of the guilt phase. *People v Catlin, supra*, 26 C4th at 114.

☛ JUDICIAL TIPS:


- The court should not allow questioning of penalty phase jurors for the purpose of determining whether there are grounds for the motion. *People v Malone, supra*; *People v Ainsworth* (1988) 45 C3d 984, 1028, 248 CR 568.
- If the motion is granted, the court must state supporting facts on the record and have the statement made part of the minutes. Pen C §190.4(c).

**d. [§99.8] Shackling and Other Security Measures**

During the penalty phase, as well as the guilt phase, the defendant may be visibly shackled only if it is justified by an essential interest, such as courtroom security, specific to the defendant on trial. *Deck v Missouri* (2005) 544 US 622, 125 S Ct 2007, 161 L Ed 2d 953 (unjustified shackling violates due process); see *People v Ervine* (2009) 47 C4th 745, 773, 102 CR3d 786. Trial courts have latitude to restrain dangerous defendants but must make an individualized security determination. 544 US at 632. The same principles apply to use of a stun belt. *People v Howard* (2011) 51 C4th 15, 28, 118 CR3d 678.

- ☛ JUDICIAL TIP: Do not permit routine shackling or use of a stun belt. When you do permit it, make a determination on the record that reflects particular concerns, such as special security needs or escape risks, related to the particular defendant. Some judges believe that leg braces worn under defendant's pants and invisible to the jury may be used with a lesser showing (see *People v Cleveland* (2004) 32 C4th 704, 739, 11 CR3d 236); When defendant is shackled, see §99.128 as to instructions.

Before stationing a courtroom deputy next to a testifying defendant the trial court must determine on a case-by-case basis whether such heightened security is appropriate. *People v Hernandez* (2011) 51 C4th 733, 736, 121 CR3d 103.

 JUDICIAL TIP: Avoid having a shackled defendant walk to and from the witness stand while jurors are present.

#### e. [§99.9] Bifurcation

The court may bifurcate the penalty trial of codefendants, using the same jury to hear and decide the cases consecutively. *People v Cleveland* (2004) 32 C4th 704, 756–760, 11 CR3d 236 (witness statement that defendant A told her he had shot victims was inadmissible against A because of marital privilege; defendants B and C wanted to offer the statement in mitigation).

### 2. Burden, Quantum, and Order of Proof

#### a. [§99.10] Burden and Quantum of Proof

Subject to two exceptions, no burden of proof or persuasion exists during the penalty phase because the “determination of penalty is essentially moral and normative.” *People v Hayes* (1990) 52 C3d 577, 643, 276 CR 874. In accord: *People v Lenart* (2004) 32 C4th 1107, 1135, 12 CR3d 592. The exceptions are factors (b) and (c); the prosecution must prove them beyond a reasonable doubt. See CALCRIM 764–766; CALJIC 8.86–8.88; §99.45.

The reasonable doubt standard does not apply to other penalty phase matters; no particular quantum of proof is required for them. *People v Griffin* (2004) 33 C4th 536, 595, 15 CR3d 743 (capital case penalty determination does not entail fact-finding but making normative assessment; hence *Ring v Arizona* (2002) 536 US 584, 122 S Ct 2428, 153 L Ed 2d 536, and *Apprendi v New Jersey* (2000) 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435, which require proof beyond reasonable doubt of facts that increase penalty, are inapplicable); *People v Prieto* (2003) 30 C4th 226, 262, 133 CR2d 18. *People v Doolin* (2009) 45 C4th 390, 456, 87 CR3d 209, is in accord. Illustrations:

- The jury does not have to find that one or more aggravating factors are present. *People v Mayfield* (1997) 14 C4th 668, 806, 60 CR2d 1.
- The prosecution need not prove beyond a reasonable doubt or at all that aggravating factors outweigh mitigating factors. *People v Cornwell* (2005) 37 C4th 50, 103, 33 CR3d 1; *People v Cox* (2003) 30 C4th 916, 971, 135 CR2d 272.

- The jury need not be convinced beyond a reasonable doubt that the death penalty is proper for the particular defendant. *People v Bacigalupo* (1991) 1 C4th 103, 145, 2 CR2d 335.
- A juror may properly vote for death when the considerations pro and con are evenly balanced in the juror's mind. *People v Hayes, supra*.
- The court need not instruct the jury on a standard for resolving factual disputes. *People v Holt* (1997) 15 C4th 619, 682–684, 63 CR2d 782; see §99.113.

#### b. [§99.11] Order of Proof

Customarily the prosecution first presents its evidence, which must be relevant to one or more statutory aggravating factors. See §99.19. This means the prosecution's case-in-chief is limited to evidence admissible under factors (a)–(c), and (i). See §99.20.

The defense may then offer evidence in mitigation and in rebuttal of the prosecution's case. The prosecution has an opportunity to rebut defendant's evidence. At this point the prosecution is no longer restricted to evidence relevant to a particular factor. See §§99.65–99.69. Surrebuttal may follow. Courts occasionally vary this sequence; however, some judges caution against innovating in a capital case.

### 3. [§99.12] No Right of Allocution

Defendant has no right to address the penalty phase jury without being subject to cross-examination other than the usual right of a pro per to argue the case. *People v Zambrano* (2007) 41 C4th 1082, 1182, 63 CR3d 297; *People v Keenan* (1988) 46 C3d 478, 511, 250 CR 550.

#### ☛ JUDICIAL TIPS:

- Defendant might seek an alternative ruling to limit his or her cross-examination to the specifics of defendant's testimony. Most judges would deny such a broad motion. See *People v Monterroso* (2004) 34 C4th 743, 768–770, 22 CR3d 1; *People v Keenan, supra*, 46 C3d at 511–513.
- If the court does allow defendant to address the jury without being cross-examined, it should permit the prosecutor to comment briefly during argument that this testimony was not subject to cross-examination. *People v Hunter* (1989) 49 C3d 957, 989, 264 CR 367.

#### 4. [§99.13] Order of Argument; Equal Number of Arguments

In light of the fact that neither side has the burden of proving that one penalty or the other is the proper one, the prosecution is not entitled to have two arguments to defendant's one; the number of arguments should be equal and both sides should have the opportunity for rebuttal. *People v Bandhauer* (1967) 66 C2d 524, 531, 58 CR 332; see *People v Robertson* (1989) 48 C3d 18, 58, 255 CR 631.

Accordingly, most trial courts use a prosecution-defense-prosecution-defense sequence of argument. Some courts employ a prosecution-defense sequence. See, e.g., *People v Payton* (1992) 3 C4th 1050, 1071–1072, 13 CR2d 526.

##### ☛ JUDICIAL TIPS:

- Judges who prefer the simpler sequence should obtain a stipulation.
- Some judges use the first sequence when two defense attorneys want to argue and the second when only one wishes to do so.

Two counsel on each side have the right to argue. *Pen C §1095*; see *People v Snow* (2003) 30 C4th 43, 93, 132 CR2d 271. This is true even when there is no rebuttal argument. *People v Bonin* (1988) 46 C3d 659, 691–693, 250 CR 687, overruled on other grounds in 17 C4th 800, 823 n1.

#### 5. Responding to Jury Inquiries

##### a. [§99.14] Questions About Inability To Agree

When jurors during their deliberations ask what will happen if they cannot agree, they should be told not to discuss or consider this question. The jury should *not* be informed of the consequences of inability to reach a verdict. *People v Hines* (1997) 15 C4th 997, 1075, 64 CR2d 594; *People v Kimble* (1988) 44 C3d 480, 511, 244 CR 148 (detailed discussion); see also *People v Bell* (1989) 49 C3d 502, 552, 262 CR 1 (approving reply: “That would not be of any concern to the jury. That would be of concern to the court”). Advising the jury about subsequent retrials could unduly confuse and mislead it. *People v Belmontes* (1988) 45 C3d 744, 814, 248 CR 126; *People v Kimble*, *supra*.

##### b. [§99.15] Inquiries Regarding Effect of Verdict

Jurors often ask whether a defendant sentenced to LWOP could ever be released from prison. When the jury raises this question, the court's “fundamental duty” is to inform the jury that it is not to consider this matter in its deliberations. *People v Bonillas* (1989) 48 C3d 757, 798, 257 CR 895. See *People v Benavides* (2005) 35 C4th 69, 115, 24 CR3d 507

(advisable though not mandatory that court briefly tell jury that considering possibility of commutation would violate its duty). Proper responses include:

- It is [will be] your responsibility to decide which penalty is appropriate in this case. You must base your decision upon the evidence you have heard [will hear] in court, informed by the instructions I have given [will give] you. You must not be influenced by speculation or by any considerations other than those upon which I have instructed [will instruct] you. *People v Letner & Tobin* (2010) 50 C4th 99, 206, 112 CR3d 746; see §99.116.

You were instructed [will be instructed] on the applicable law and should not consider or speculate about other matters. *People v Verdugo* (2010) 50 C4th 263, 303, 113 CR3d 803. The power of commutation applies to both death and LWOP sentences, but it would be improper for you to consider this possibility. *People v Williams* (2010) 49 C4th 405, 467–469, 111 CR3d 589; *People v Bramit* (2009) 46 C4th 1221, 1246, 96 CR3d 574; see CALCRIM 767. Telling the jury to assume that the sentence will be carried out is misleading. *People v Letner & Tobin, supra*.

#### 👉 JUDICIAL TIPS:

- The court should never comment solely about the Governor’s power to commute without telling the jury not to consider the matter. See *People v Ramos* (1984) 37 C3d 136, 159 n12, 207 CR 800.
- When you have to mention commutation, make sure to say it applies to both LWOP and death sentences.
- If this topic was covered during juror orientation, as it should have been (see California Judges Benchguide 98: *Death Penalty Benchguide: Pretrial and Guilt Phase* §§98.35(3), 98.103 (spoken form) (Cal CJER)), stick to the same wording.

When a question is asked whether LWOP could be considered a more severe punishment than death, it is proper to respond that under the law, the death penalty is the more severe one, that this is the law that jurors must follow, and that they may not inject their own beliefs as to what is the tougher penalty. *People v Harris* (2005) 37 C4th 310, 361, 33 CR3d 509. When this question arises during deliberations you may instead reinstruct with CALJIC 8.88. *People v Tate* (2010) 49 C4th 635, 707, 112 CR3d 156.

### c. [§99.16] Requests for Definitions

Most requests for definitions may be properly answered by advising the jury that it should give the words their commonly understood meaning. See, e.g., *People v Kirkpatrick* (1994) 7 C4th 988, 1017–1018, 30 CR2d 818 (jury asked for definitions of aggravating and mitigating circumstances). For discussion of defining “extenuating circumstances” on request, see *People v Lucero* (2000) 23 C4th 692, 723, 97 CR2d 871.

### d. [§99.17] Questions About Mitigating Evidence

When the jury questions whether it can consider certain mitigating evidence that has been introduced, the fact that it does so shows that the jurors misunderstand their basic obligations. Accordingly, such questions should be answered directly and *not* by rereading instructions or by referring jurors to them. See *McDowell v Calderon* (9th Cir 1997) 130 F3d 833, 837, 839–841.

#### ☛ JUDICIAL TIPS:

- As a lower federal court decision, *McDowell* is not binding in California courts (see, e.g., *People v Williams* (1997) 16 C4th 153, 190, 66 CR2d 123). Many judges, however, suggest that following *McDowell* costs little, if anything, and reduces the risk of a penalty phase retrial.
- Before answering a jury inquiry in this area by rereading instructions, the judge might consider “whether there is a reasonable likelihood that the jury” will apply the instruction “in a way that prevents the consideration of constitutionally relevant evidence.” *Boyde v California* (1990) 494 US 370, 380, 110 S Ct 1190, 108 L Ed 2d 316. When such a danger exists, something other than, or in addition to, rereading is in order.

### 6. [§99.18] Verdict

The jury usually renders only a verdict on the sentence; it need not and customarily does not make special findings. *Hildwin v Florida* (1989) 490 US 638, 109 S Ct 2055, 104 L Ed 2d 728 (jury not required to specify aggravating factors that justify death sentence).

The only unanimity requirement is as to the final verdict; the jury need not agree on any particular factor. *People v Mayfield* (1997) 14 C4th 668, 806, 60 CR2d 1; *People v Caro* (1988) 46 C3d 1035, 1057, 251 CR 757. The court may but need not use separate verdicts for separate counts. *People v Hines* (1997) 15 C4th 997, 1070, 64 CR2d 594.

### ☛ JUDICIAL TIPS:

- In multiple-count cases, the jury should be given separate verdict forms for each count on which it is to impose a penalty. *People v Coddington* (2000) 23 C4th 529, 566 n7, 97 CR2d 528, overruled on other grounds in 25 C4th 1046, 1069 n13.
- The judge should have extra bailiffs in the courtroom when the jury returns with a verdict. This is a highly charged moment.

## D. Evidence

### 1. [§99.19] Principles Generally Applicable to Penalty Phase Evidence

Four fundamental aspects governing introduction of evidence at the penalty phase are:

- (1) Prosecution evidence during its case-in-chief is limited to evidence that is relevant to one or more of the statutory factors. See §99.20.
- (2) Mitigating evidence is broadly admissible. See §§99.21–99.22.
- (3) The operation of Evid C §352 is limited. See §§99.23–99.25.
- (4) The prosecutor may not use inconsistent and irreconcilable factual theories that increase culpability against codefendants without good faith justification. *In re Sakarias* (2005) 35 C4th 140, 145, 160, 25 CR3d 265 (defendants tried separately, prosecutor attributed all fatal blows to each defendant; held to violate due process).

#### a. [§99.20] Evidence in Aggravation Limited to Statutory Factors

During its case-in-chief, the prosecution may introduce only evidence relevant to one or more of the statutory factors because Pen C §190.3 mandates that the jury make its sentencing decision solely in light of these factors. *People v Boyd* (1985) 38 C3d 762, 772–776, 215 CR 1.

For example, evidence of defendant's bad character is usually not relevant to any aggravating factor; the prosecution may offer such evidence, if at all, only on rebuttal. See *People v Avena* (1996) 13 C4th 394, 439, 53 CR2d 301. The same is true of evidence that defendant abused drugs and alcohol. See *People v Hardy* (1992) 2 C4th 86, 207, 5 CR2d 796.

This principle does not preclude the introduction of evidence that is often very damaging to defendant, such as victim impact testimony (see §99.28), evidence of other violent crimes (see §§99.32–99.45), and prior convictions (see §§99.46–99.52).

## b. Broad Admissibility of Mitigating Evidence

### (1) [§99.21] Expansive Construction of Factor (k)

Mitigating evidence, like aggravating evidence, must be relevant to one or more of the statutory factors. *People v Boyd* (1985) 38 C3d 762, 773, 215 CR 1. However, factor (k) is construed broadly as an open-ended provision that allows “the jury to consider any mitigating evidence.” 38 C3d at 775; *People v Easley* (1983) 34 C3d 858, 878, 196 CR 309. Constitutional considerations require this construction. *Eddings v Oklahoma* (1982) 455 US 104, 114, 102 S Ct 869, 71 L Ed 2d 1 (sentencer in capital case may not be precluded from considering “any relevant mitigating evidence”); *Skipper v South Carolina* (1986) 476 US 1, 106 S Ct 1669, 90 L Ed 2d 1 (death sentence reversed because court excluded evidence of defendant’s behavior in prison).

Improper exclusion of mitigating evidence is sometimes called *Skipper* error and is reversible unless harmless beyond a reasonable doubt. *People v Fudge* (1994) 7 C4th 1075, 1117, 31 CR2d 321.

☛ JUDICIAL TIP: The judge should resolve doubts in favor of admitting mitigating evidence and against aggravating evidence.

### (2) [§99.22] Hearsay Rule Relaxed

The principle of broad admissibility of mitigating evidence extends to hearsay when it is “highly relevant” and when there are substantial reasons to consider it reliable. *Green v Georgia* (1979) 442 US 95, 97, 99 S Ct 2150, 60 L Ed 2d 738 (evidence introduced by prosecution in codefendant’s separate trial admissible to show codefendant alone killed victim); *People v Morrison* (2004) 34 C4th 698, 725, 21 CR3d 682; *People v Harris* (1984) 36 C3d 36, 70, 201 CR 782 (defendant’s jailhouse poetry, confiscated by authorities, admissible).

Hearsay that fails to meet these twin requirements is properly excluded:

- A deposition that corroborates other testimony and is of tangential value at best. *People v Smithey* (1999) 20 C4th 936, 993–997, 86 CR2d 243.
- Defendant’s letters from jail when defendant fails to show that they are something more than unreliable, self-serving hearsay. *People v Kraft* (2000) 23 C4th 978, 1074, 99 CR2d 1.
- Videotapes defendant made to support his insanity claim. *People v Weaver* (2001) 26 C4th 876, 981, 111 CR2d 2 (not particularly reliable; jurors should be allowed to consider nonhearsay aspects of tape, such as defendant’s demeanor and remorse).

- Gang members' statements to defendant's parole officer, expressing their belief in defendant's innocence. *People v Champion* (1995) 9 C4th 879, 938, 39 CR2d 547.
  - A ten-year-old psychiatric report whose importance is reduced by other stronger evidence that was admitted. *People v Wright* (1990) 52 C3d 367, 430, 276 CR 731.
  - A taped statement by, and notebook of, defendant. *People v Edwards* (1991) 54 C3d 787, 837–838, 1 CR2d 696.
  - Defendant's statements to a psychiatrist (*People v Elliot* (2005) 37 C4th 453, 481, 35 CR3d 759) or girlfriend. (*People v Williams* (2006) 40 C4th 287, 321, 52 CR3d 268 (statement that she should move on with her life and marry someone who would adopt their child)).
  - A videotape of defendant's interrogation by police detectives. *People v Russell* (2010) 50 C4th 1228, 1257–1260, 117 CR3d 615 (despite introduction of same evidence by prosecution at guilt phase); *People v Jurado* (2006) 38 C4th 72, 128, 41 CR3d 319 (offered to show remorse, excluded as self-serving); but see *People v Huggins* (2006) 38 C4th 175, 243, 41 CR3d 593 (statement to officers showing lack of remorse admissible).
- ➡ JUDICIAL TIP: Consider whether the tape is admissible for a nonhearsay purpose, such as showing defendant's demeanor.
- A videotape of a lecture on how students with learning disabilities tend to react in certain situations. *People v Thornton* (2007) 41 C4th 391, 443, 61 CR3d 461.

### c. Operation of Evid C §352

#### (1) [§99.23] Changed Balance Between Relevance and Prejudice

One respect in which Evid C §352 functions somewhat differently in the penalty phase than in the guilt phase is that the balance between relevance and prejudice may shift. For example, photographs that have little probative value in determining guilt and that would be highly prejudicial at that stage are often very pertinent and less prejudicial in the penalty phase as evidence of the circumstances of the crime. *People v Anderson* (2001) 25 C4th 543, 591, 106 CR2d 575; *People v Edwards* (1991) 54 C3d 787, 836, 1 CR2d 696; see *People v Booker* (2011) 51 C4th 141, 187, 119 CR3d 722.

Some evidence, such as factor (b) evidence of other violent criminal acts, is often inadmissible to prove guilt but is routinely admitted in the

penalty phase. See, e.g., *People v Douglas* (1990) 50 C3d 468, 531, 268 CR 126 (physical evidence).

“Prejudice” under Evid C §352 does not mean “damaging”; it refers to evidence that poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. *People v Booker*, supra, 51 C4th at 188.

## (2) [§99.24] Discretion Limited—Prosecution Evidence

The court may not exclude all evidence related to a statutory sentencing factor. *People v Visciotti* (1992) 2 C4th 1, 68, 5 CR2d 495; *People v Karis* (1988) 46 C3d 612, 641, 250 CR 659; see *People v Davenport* (Davenport II) (1995) 11 C4th 1171, 1205, 47 CR2d 800. Thus, devastating victim impact evidence is routinely admitted, although not entirely without limitations. See §99.28. Similarly, courts lack discretion to preclude proof of a prior conviction on Evid C §352 grounds, but they may reduce the prejudicial effect of such evidence by limiting it to court records. *People v Bacigalupo* (1991) 1 C4th 103, 140, 2 CR2d 335. Similarly, while courts lack discretion to exclude all evidence of uncharged violent criminal activity, they have power to exclude misleading, cumulative, and unduly prejudicial evidence. *People v Booker* (2011) 51 C4th 141, 187, 119 CR3d 722.

The court retains discretion under Evid C §352 regarding the form of penalty phase evidence. *People v Carpenter* (1997) 15 C4th 312, 400, 63 CR2d 1; *People v Freeman* (1994) 8 C4th 450, 512, 34 CR2d 558. For example, a court may:

- Exclude a photograph or other evidence that is inaccurate or cumulative. See *People v Carpenter*, supra; *People v Davenport*, supra, 11 C4th at 1206.
- Curtail prosecution or defense cross-examination that is of marginal relevance, unduly time-consuming, or repetitious. *People v Mincey* (1992) 2 C4th 408, 464, 6 CR2d 822; *People v DeSantis* (1992) 2 C4th 1198, 1236 n16, 9 CR2d 628.
- Require that a point be proved in relatively unprejudicial form. *People v Bacigalupo*, supra.

## (3) [§99.25] Discretion Limited—Defense Evidence

The court’s control over mitigating evidence is particularly limited. Evidence of a plea offer made to defendant may be excluded in light of its high potential for confusing the jury and its low probative value. *People v Fauber* (1992) 2 C4th 792, 855–856, 9 CR2d 24. On the other hand, evidence of defendant’s willingness to plead guilty may be admissible to show remorse or willingness to take responsibility for criminal behavior. *People v Williams* (1988) 45 C3d 1268, 1332, 248 CR 834. See *People v*

*Ledesma (Ledesma II)* (2006) 39 C4th 641, 735, 47 CR3d 326 (evidence of attempt to plead guilty to LWOP admitted, but circumstances surrounding plea negotiations irrelevant, as is evidence that prosecutor was not seeking death penalty against accomplices).

Caution is needed in dealing with claims that proffered mitigating evidence is cumulative or should be excluded on other [Evid C §352](#) grounds. Illustrations:

- Testimony of prison guards that defendant adjusted well in prison may not be excluded as being cumulative to similar testimony by defendant and family members; the former evidence carries more weight. *Skipper v South Carolina* (1986) 476 US 1, 8, 106 S Ct 1669, 90 L Ed 2d 1; see *People v Lucero* (1988) 44 C3d 1006, 1030, 245 CR 185 (expert testimony concerning defendant’s psychological disorder not excludable as cumulative).

☛ JUDICIAL TIP: In the *Skipper* situation, some repetition of family testimony about defendant’s prison adjustment can probably be limited.

- Expert testimony that defendant is a good candidate to lead a productive and nonviolent life in prison may not be excluded under [Evid C §352](#). *People v Fudge* (1994) 7 C4th 1075, 1112–1117, 31 CR2d 321.

## 2. [§99.26] Factor (a): Circumstances of the Crime

Generally four kinds of evidence are admitted or considered by the jury under factor (a):

- (1) Evidence from prior phases of the trial. See [§99.27](#).
- (2) Victim impact evidence. See [§99.28](#).
- (3) Evidence of defendant’s lack of remorse. See [§99.29](#).
- (4) Other evidence relevant to the circumstances of the underlying crimes. See [§99.30](#).

Factor (a) evidence is not limited to “the immediate temporal and spatial circumstances of the crime. Rather, it extends to that which surrounds materially, morally, or logically the crime.” *People v Blair* (2005) 36 C4th 686, 749, 31 CR3d 485.

### a. [§99.27] Evidence Previously Presented; Exception

In the penalty phase, the jury considers evidence presented at any earlier phase of the trial that was heard by the same jury. [Pen C §190.4\(d\)](#). This provision is obviously intended to eliminate the necessity for reintroduction of evidence that has already been presented to the trier of fact. *People v Robertson* (1982) 33 C3d 21, 54 n18, 188 CR 77. When the penalty phase is tried before a jury different from the guilt phase jury,

reintroduction becomes necessary; this is one of the practical considerations in favor of keeping the same jury. The new jury need not hear all the guilt phase evidence. *People v Slaughter* (2002) 27 C4th 1187, 1224, 120 CR2d 477.

However, even when the jury remains the same, it may not consider guilt phase evidence of other criminal activity that did not involve violence or a threat of violence. *Pen C §190.3*; see *People v Williams* (1988) 45 C3d 1268, 1331–1332, 248 CR 834. An illustration of such activity is a nonviolent escape attempt. See *People v McLain* (1988) 46 C3d 97, 113, 249 CR 630.

A guilty plea to felony murder does not preclude the prosecution from showing that the circumstances of the crime prove premeditation. *People v Williams* (2006) 40 C4th 287, 305, 52 CR3d 268. Nevertheless, the court has no duty to instruct sua sponte on premeditation. 40 C4th at 325.

- JUDICIAL TIP: When you accept such a plea make a clear record as to what the prosecutor will be allowed to prove during the penalty phase about the offense involved in the plea.

#### b. [§99.28] Victim Impact Evidence

Victim impact evidence is admissible as a circumstance of the crime. *Payne v Tennessee* (1991) 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720 (overruling contrary decisions); *People v Edwards* (1991) 54 C3d 787, 835, 1 CR2d 696; see *People v Roldan* (2005) 35 C4th 646, 731–733, 27 CR3d 360 (admissible as circumstance of crime, but pretrial notice must be given under *Pen C §190.3*). It consists of evidence

- Relating to the victim’s personal characteristics and the crimes’ emotional impact on the victim’s family. *Payne v Tennessee, supra*, 501 US at 817.
- Of the psychological and emotional trauma that a surviving victim suffered as a result of the homicide. *People v Mitcham* (1992) 1 C4th 1027, 1062, 5 CR2d 230.

The function of such evidence is to provide the sentencing authority with information about the specific harm the crime has caused. *Payne v Tennessee, supra*, 501 US at 825; *People v Edwards, supra*. *Payne* and *Edwards* apply retroactively. *People v Hamilton* (2009) 45 C4th 863, 926, 89 CR3d 286; *People v Ashmus* (1991) 54 C3d 932, 991, 2 CR2d 112; see *People v Brown* (2004) 33 C4th 382, 394, 15 CR3d 624.

Victim impact testimony is not limited to blood relatives. *People v Brown, supra*, 33 C4th at 397 (other persons injured in incident that killed victim); *People v Pollock* (2004) 32 C4th 1153, 1183, 13 CR3d 34 (close

friends); *People v Brown* (2003) 31 C4th 518, 572–573, 3 CR3d 145 (mother-in-law).

Testimony by surviving family members is frequently heart-wrenching, bringing tears to the eyes of jurors and others in the courtroom. This powerful emotional impact is not a basis for excluding all such evidence; rather, courts must guard against

- Unduly prejudicial evidence that renders the trial fundamentally unfair. *Payne v Tennessee*, *supra*, 501 US at 825.
- “[I]rrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role or invites an irrational, purely subjective response.” *People v Edwards*, *supra*, 54 C3d at 836; *People v Howard* (1992) 1 C4th 1132, 1190, 5 CR2d 268.
- Evidence that may become prejudicial through sheer volume. See *People v Robinson* (2005) 37 C4th 592, 644–652, 36 CR3d 760.

For example, the judge in the trial of Timothy McVeigh for the bombing of the federal building in Oklahoma City admitted extensive testimony by relatives and survivors, but excluded wedding photographs of victims, testimony about how relatives identified victims, a poem written by the father of one victim, and testimony of a family’s mourning ceremony near the bombed building. *San Francisco Chronicle*, June 4, 1997 (also quoting the trial judge as saying he was determined not to turn the penalty phase “into some kind of lynching”). See *U.S. v McVeigh* (10th Cir 1998) 153 F3d 1166, 1220–1222.

Courts must exercise great caution in admitting videotapes, especially those that last more than a few moments or emphasize the childhood of an adult victim or are accompanied by music. To combat the strong possibility of prejudice, courts must strictly analyze evidence of this type and monitor jurors’ reactions to ensure that the proceedings are not infected with undue emotion. *People v Zamudio* (2008) 43 C4th 327, 367, 75 CR3d 289; *People v Prince* (2007) 40 C4th 1179, 1289, 57 CR3d 543 (tape admission proper under the particular circumstances; trial judge excluded part of tape and closely scrutinized jurors). In accord: *People v Kelly* (2007) 42 C4th 763, 798, 68 CR3d 531 (trial courts must be “very cautious” in admitting such evidence); *People v Dykes* (2009) 46 C4th 731, 784–785, 95 CR3d 78 (trial court ordered audio portion of tape deleted and vigorously cautioned prosecutor to keep testimony during playing of tape unemotional; tape was not a memorial, tribute, or eulogy).

#### 👉 JUDICIAL TIPS:

- In deciding on admissibility, judges should
  - Consider relevance. For example, the opinions of family members about the crime, the defendant, or the appropriate

punishment have little or no relevance and should usually be excluded (see *Payne v Tennessee*, *supra*, 501 US at 830 n2; *People v Smith* (2003) 30 C4th 581, 622, 134 CR2d 1) beyond a brief statement of wanting defendants to pay for what they did to the family (*People v Johnson* (1992) 3 C4th 1183, 1245, 14 CR2d 702). Testimony that during the victim's funeral the casket lid opened and people screamed and fainted is not relevant to defendant's moral culpability (*People v Harris* (2005) 37 C4th 310, 352, 33 CR3d 509). However, a brief videotape of the victim's memorial and funeral services is relevant. *People v Brody* (2010) 50 C4th 547, 579–581, 113 CR3d 458 (eulogies edited out; tape not enhanced by narration or visual imagery). Background music on a videotape of still photographs depicting the victims' lives is irrelevant. *People v Zamudio*, *supra*, 43 C4th at 366. A 911 tape on which the surviving victim is heard screaming when she discovered her mother's body is relevant. *People v Hawthorne* (2009) 46 C4th 67, 101–102, 92 CR3d 330.

- Consider the temporal nearness or remoteness of the evidence. Photographs of victims taken shortly before their death may be admissible (*People v Edwards*, *supra*); wedding pictures might not be. But see *People v Nelson* (2011) 51 C4th 198, 219, 120 CR3d 406 (discretion to admit childhood photographs of victim). A videotape containing many photos of the victim may also be inadmissible. See *People v Robinson*, *supra*, 37 C4th at 652. But see *People v Hamilton*, *supra*, 45 C4th at 926–927 (discretion to admit evidence that victim's husband suffered for many years after the murder; *People v Kelly*, *supra* (discretion to admit tape of victim's life from infancy).
- Consider duplication. Testimony by one or two family members may suffice. So may one or two photographs. See *People v Cook* (2006) 39 C4th 566, 609, 47 CR3d 22. See also *People v Kelly*, *supra* (videotape supplemented without duplicating testimony of the only victim impact witness).
- Not consider the difficulty of rebutting victim impact evidence. *Payne v Tennessee*, *supra*.
- When family members (or surviving victims) testify, judges should
  - Direct the witnesses to address the jury, not the defendant.
  - Stare at the clock at the back of the courtroom so as not to show any emotion to the jury. One very experienced judge

has commented: “God forbid a juror sees a tear in the judge’s eye.”

- Disputes about the permissible scope of victim impact testimony can often best be resolved between the guilt and penalty phases. One experienced prosecutor suggests that the court require the prosecution to submit a list of questions in advance because their scope is always in issue.

For discussion of victim impact evidence related to crimes other than the underlying murder(s), see §99.43; for victim impact argument, see §99.97. For evidence concerning the impact of a death sentence on defendant’s family, see §99.64. The court may, but need not, instruct on how the jury should consider victim impact evidence. *People v Valencia* (2008) 43 C4th 268, 310, 74 CR3d 605; see *People v Zamudio*, *supra*, 43 C4th at 368 (proposed instruction misleading and, to extent correct, adequately covered by another that was given). For instruction wording, see CALJIC 8.85.1; for wording not to use, see *People v Foster* (2010) 50 C4th 1301, 1361, 117 CR3d 658. For an instruction given by the court after admitting a tape, see *People v Hawthorne*, *supra*, 46 C4th at 101 (court cautioned jury not to let emotion control evaluation of evidence.)

### c. [§99.29] Lack of Remorse

Evidence of remorselessness at the scene of the crime or during flight from it is admissible as a circumstance of the crime; evidence of post crime remorselessness is not. *People v Collins* (2010) 49 C4th 175, 227, 110 CR3d 384; *People v Pollock* (2004) 32 C4th 1153, 1185, 13 CR3d 34 (flight); *People v Gonzalez* (1990) 51 C3d 1179, 1232, 275 CR 729; in accord *People v Nelson* (2011) 51 C4th 198, 224, 120 CR3d 406; see *People v Cain* (1995) 10 C4th 1, 77, 40 CR2d 481 (defendant’s boasts 20 to 30 minutes after crime give rise to inference of defendant’s attitude during crime).

#### ☛ JUDICIAL TIPS:

- The defense opening statement may introduce issues to which lack of remorse is relevant. See *People v Bell* (2007) 40 C4th 582, 606, 54 CR3d 453 (claim that killing occurred during psychotic break).
- Evidence of defendant’s postcrime conduct is often admissible as rebuttal of defendant’s character testimony. For discussion of rebuttal, see §99.65–99.69.
- Defendant may introduce evidence of postcrime remorse under factor (k).
- During argument, the prosecution may note defendant’s lack of remorse, whether at the scene of the crime or later. See §99.88.

#### d. Other Evidence

##### (1) [§99.30] Prosecution Evidence

Guilt phase evidence is often supplemented by other evidence relevant to the circumstances of the crime. For example,

- Evidence showing the victim’s vulnerability, such as that the victim had cerebral palsy (*People v Clair* (1992) 2 C4th 629, 671, 7 CR2d 564) or poor eyesight (*People v Carrera* (1989) 49 C3d 291, 336, 261 CR 348 (evidence supports inference that victim probably did not resist, which in turn bears on manner in which defendant committed murders)).
  - Photographs of the victim’s dead body. *People v Bonilla* (2007) 41 C4th 313, 353, 60 CR3d 209 (circumstances of crime include its gruesome consequences; court’s discretion to exclude more limited than at guilt phase); *People v Fields* (1983) 35 C3d 329, 372, 197 CR 803. Such photographs are admissible even against an aider and abettor. *People v Dickey* (2005) 35 C4th 884, 924, 28 CR3d 647.
  - Evidence that defendant committed the present crimes a few days following his release from prison after serving five years for manslaughter. *People v Johnson* (1992) 3 C4th 1183, 1243, 14 CR2d 702.
- ☛ JUDICIAL TIP: Although this evidence came from defendant’s parole officer, proposed parole or probation officer testimony does not always come within a statutory aggravating factor. See, e.g., *People v Lucky* (1988) 45 C3d 259, 302, 247 CR 1 (parole officer cannot testify during prosecution’s case-in-chief that defendant avoided supervision and was manipulative); *People v Johnson, supra*, 3 C4th at 1243 n15.
- Testimony that defendants belonged to a gang, when the evidence suggests that the gang committed the murders. *People v Champion* (1995) 9 C4th 879, 942–943, 39 CR2d 547; see *People v Williams* (1997) 16 C4th 153, 249–251, 66 CR2d 123.
  - Testimony by a psychologist about the fantasies, preparations and methods of sadistic pedophiles such as defendant. *People v Smith* (2005) 35 C4th 334, 350–352, 25 CR3d 554 (admissible when it explains motivation, methods to commit crime and evidence found in defendant’s home).
- ☛ JUDICIAL TIP: Such testimony is admissible only if the witness relates it to the crime. 35 C4th at 355; *People v Coleman* (1989) 48 C3d 112, 149, 251 CR 813 (psychologist’s testimony

concerning defendant's mental condition as it related to dangerousness inadmissible in prosecution's case in chief). General evidence concerning a defendant's mental state is not admissible in aggravation. *People v Smith, supra*, 35 C4th at 355.

- An autopsy protocol that sheds light on the manner in which defendant killed the victim. *People v Hovey* (1988) 44 C3d 543, 576, 244 CR 121.
- Defendant's statements to a jailhouse informant that show his attitude toward his victims. *People v Payton* (1992) 3 C4th 1050, 1063, 13 CR2d 526.
- Evidence of the murder victim's pregnancy to show the specific harm caused by the crime. *People v Jurado* (2006) 38 C4th 72, 130, 41 CR3d 319 (admissible whether or not defendant knew of pregnancy).

➡ JUDICIAL TIP: Decisions that uphold admission of evidence often state that there was no abuse of discretion. See, e.g., *People v Payton, supra*; *People v Hovey, supra*. Under particular circumstances, discretion may point the other way; it is appropriate here to weigh probative value against prejudicial effect. *People v Payton, supra*.

## (2) [§99.31] Defense Evidence

Defendant may also introduce evidence concerning the circumstances of the capital crime in order to mitigate culpability and to create lingering doubt about defendant's guilt. See, e.g., *People v Gay* (2008) 42 C4th 1195, 1217–1221, 73 CR3d 442 (at penalty phase retrial, defendant entitled to present evidence that codefendant was sole shooter); *People v Johnson* (1992) 3 C4th 1183, 1252, 14 CR2d 702 (residual doubt). The defendant may not introduce polygraph evidence, even if he offers to prove its scientific reliability. *People v Richardson* (2008) 43 C4th 959, 1032, 77 CR3d 163; Evid C §351.1.

For further discussion of lingering or residual doubt, see §99.61.

## 3. Factor (b): Other Violent Criminal Activity

### a. [§99.32] Checklist: Determining Admissibility of Factor (b) Evidence

(1) *Rule on objections that are not unique to factor (b), such as objections based on hearsay or exclusionary rules.* See, e.g., *People v Valencia* (2008) 43 C4th 268, 296–297, 74 CR3d 605 (corpus delicti rule applies, but does not block admission of confession); *People v Roldan* (2005) 35 C4th 646, 724, 27 CR3d 360 (attorney-client privilege bars

testimony by defense experts concerning defendant's threats of violence); *People v Beardslee* (1991) 53 C3d 68, 108, 279 CR 276 (fruit-of-poisonous-tree issue).

- JUDICIAL TIP: Defer ruling on Evid C §352 objections (see step (4), below) and a prosecution contention that evidence not showing a factor (b) offense is admissible as part of defendant's factor (b) course of conduct (see step (5), below).

(2) *Determine challenges to the legal sufficiency of the admissible evidence.* This may necessitate resolution of the following questions:

- *Was defendant's conduct a crime?* See §§99.33–99.39.

If yes, proceed to the next question; if not, deny admission. It is immaterial whether the crime was a felony, misdemeanor, or juvenile offense, when it was committed, and what the result of any prior prosecution was other than an acquittal. See §§99.35, 99.37–99.38.

- *Did the crime involve the use of violence or an attempt or threat to use it?* See §99.40.

If it did, proceed to the next question; if it did not, deny admission. Violence need not be a necessary element of the crime. The issue is whether defendant's conduct was both criminal and violent (or threatening violence). See §99.40. The issue is one of law, to be resolved by the court, not by the jury. *People v Loker* (2008) 44 C4th 691, 745, 80 CR3d 630; *People v Howard* (2008) 42 C4th 1000, 1027, 71 CR3d 264.

- *Was the violence directed against a person, rather than against property or an animal?* See §99.40.

If it was, proceed to the next question; if it was not, deny admission. A threat need not be aimed at a particular person and it may be inferred, e.g., from evidence that defendant was carrying a concealed weapon. See §99.40.

- *Was defendant prosecuted for the crime?*

If yes, proceed to the next question; if not, proceed to step (3). Whether defendant was prosecuted matters only if either defendant was acquitted, or defendant was convicted in the present proceedings. See §§99.33, 99.41–99.42.

- JUDICIAL TIP: Do not consider adequacy of representation in the earlier proceeding. See *People v Carter* (2005) 36 C4th 1114, 1200–1202, 32 CR3d 759 (not relevant unless prosecution also offers conviction in prior case under factor (c)).

- *Was defendant acquitted of the crime that the prosecution seeks to prove under factor (b)?*

If yes, deny admission; if not, proceed to the next question.

- *Was defendant convicted in the present case of the crime that the prosecution seeks to prove under factor (b)?*

If yes, deny admission; if not, proceed to step (3).

(3) *Determine challenge to the factual sufficiency of the admissible evidence.*

(a) *Determine whether a conviction for the same offense will be admitted under factor (c).* See §99.46.

If yes, proceed to step (4); if not, proceed to step (b).

(b) *Determine whether the admissible evidence permits a reasonable juror to conclude beyond a reasonable doubt that defendant committed the offense, including all elements of the crime.*

If yes, proceed to step (4); if not, deny admission. See *People v Thompson* (1988) 45 C3d 86, 127, 246 CR 245 (court should not permit penalty jury even to consider such a crime as aggravating factor unless there is sufficient evidence to find essential elements true under reasonable doubt standard); *People v Phillips* (1985) 41 C3d 29, 72 n25, 222 CR 127. But see *People v Yeoman* (2003) 31 C4th 93, 132, 2 CR3d 186 (foundational hearing advisable but not mandatory). The prosecution does not bear the burden at this hearing to establish beyond a reasonable doubt that defendant committed a violent crime; evidence that would allow a rational juror to make a determination beyond a reasonable doubt as to such criminal activity is sufficient. *People v Ochoa* (1998) 19 C4th 353, 449, 79 CR2d 408; see *People v Koontz* (2002) 27 C4th 1041, 1088, 119 CR2d 859; *People v Smithey* (1999) 20 C4th 936, 991, 86 CR2d 243.

➡ **JUDICIAL TIP:** It may be necessary to hear witnesses in order to assess the strength of the evidence. Many judges do not consider it adequate to take an offer of proof and merely decide whether the evidence meets the reasonable doubt test if the jury believes it. On the other hand, defendant is not entitled to try factor (b) twice. Many judges believe that at a factor (b) foundational hearing, defendant is entitled to challenge the credibility of witnesses but within reasonable limits imposed by the court.

(4) *Rule on Evid C §352 objections.* Evidence Code §352 cannot be used to make factor (b) conduct unprovable. See §99.23. Objections under Evid C §352 are often addressed to victim impact evidence (see §99.43; the impact at issue here is on the victim of the factor (b) crime) or to evidence of non-factor (b) misbehavior offered as part of a continuous course of conduct. See step (5), below.

- ☛ JUDICIAL TIP: The judge should sustain an objection under [Evid C §352](#) only if the evidence that would remain is sufficient to prove factor (b). However, an important function of this hearing is to keep out highly prejudicial evidence that might cause a mistrial were the jury to hear it.

(5) *Resolve disputes concerning the admissibility of prosecution evidence purporting to provide context for factor (b) testimony.* As a practical matter, such a dispute needs to be resolved only when the court has decided to admit factor (b) evidence. Until then it does not matter whether there is additional evidence that does not prove a factor (b) offense, but may place such an offense in context or be part of a continuous course of conduct.

(a) *Determine whether the evidence is part of a continuing course of criminal activity involving violence.* If yes, proceed to (b); if not, deny admission.

(b) *Determine whether the utility of the evidence outweighs its likely prejudicial effect.* If yes, admit; if not, deny admission. The utility of such evidence lies in giving the jury full opportunity to determine the seriousness of a factor (b) crime in deciding the appropriate penalty. [People v Melton \(1988\) 44 C3d 713, 757, 244 CR 867](#). Prejudice consists of the risk that the jury's verdict will be affected by nonstatutory aggravating factors.

☛ JUDICIAL TIPS:

Judges should reduce the risk of prejudice by:

- Keeping such evidence brief and focused.
- Cautioning the prosecutor not to suggest during argument that this particular conduct is an aggravating circumstance.
- Granting a request to instruct the jury at the time of admitting the evidence of its limited purpose.

**b. [§99.33](#) Basic Principles**

Evidence of defendant's conduct is admissible under [Pen C §190.3\(b\)](#) if the conduct

- Constituted a crime (see [§§99.34–99.39](#)), and
- Involved violence or the threat of violence against a person (see [§99.40](#)).

Evidence of a crime of which defendant has been acquitted is inadmissible. See [§99.42](#). For burden of proof, see [§99.45](#).

### c. [§99.34] Evidence of a Crime

Factor (b) evidence must show an actual crime that violates a penal statute. *People v Anderson* (2001) 25 C4th 543, 584, 106 CR2d 575; *People v Phillips* (1985) 41 C3d 29, 72, 222 CR 127. A threat of violence standing alone is not enough. *People v Belmontes* (1988) 45 C3d 744, 809, 248 CR 126 (defendant who slaps waistband and says he has all the protection he needs is arguably threatening to use force but is not committing a crime). Possession of handcuff keys is not a crime and does not by itself show an attempt to escape. *People v Lancaster* (2007) 41 C4th 50, 91–94, 58 CR3d 608.

One incident may constitute more than one crime. *People v Thornton* (2007) 41 C4th 391, 464, 61 CR3d 461. Insufficient evidence of another crime may be admissible under factor (a). *People v Michaels* (2002) 28 C4th 486, 533, 122 CR2d 285 (uncorroborated admission of uncharged contract killings admissible to show defendant's casual attitude toward killing). It may also be admissible for impeachment. *People v Hinton* (2006) 37 C4th 839, 903, 38 CR3d 149.

☛ JUDICIAL TIP: Give a limiting instruction when evidence comes in for such a limited purpose. For an illustration, see *People v Hinton*, *supra*; *People v Michaels*, *supra*.

Evidence of circumstances surrounding a factor (b) offense is admissible to provide context, even though these circumstances include other criminal activity that would not be admissible by itself. *People v Wallace* (2008) 44 C4th 1032, 1081, 81 CR3d 651.

Sections 99.35–99.39 discuss matters that do *not* affect admissibility.

### (1) [§99.35] Classification of Crime; Juvenile Offenses

Evidence of misdemeanors, as well as felonies, is admissible. See, e.g., *People v Stanley* (1995) 10 C4th 764, 821 (felonies), 824 (misdemeanors), 42 CR2d 543.

Evidence of defendant's violent criminal conduct as a juvenile is admissible when the act would have been a crime if an adult had committed it. *People v Bramit* (2009) 46 C4th 1221, 1239, 96 CR3d 574; *People v Avena* (1996) 13 C4th 394, 426, 53 CR2d 301. It is uncertain whether juvenile court records are admissible to prove the conduct underlying the juvenile adjudication. See *People v Combs* (2004) 34 C4th 821, 860, 22 CR3d 61 (unclear whether admissible or harmless error to admit). Prior decisions, not expressly overruled by *Combs*, held such records inadmissible. See *People v Champion* (1995) 9 C4th 879, 937, 39 CR2d 547; *People v Cox* (1991) 53 C3d 618, 689, 280 CR 692.

## (2) [§99.36] Out-of-State Offense

Evidence of a crime committed in another state is not barred by the fact that the same conduct would not be a crime in California. *People v Pensinger* (1991) 52 C3d 1210, 1258–1261, 278 CR 640.

## (3) [§99.37] Time of Commission

The prosecutor may offer evidence of criminal violence that was committed at any time. *People v Anderson* (2001) 25 C4th 543, 584, 106 CR2d 575; *People v Rodrigues* (1994) 8 C4th 1060, 1158, 36 CR2d 235. Thus, factor (b) applies to conduct that occurred long before the crime(s) of which defendant was convicted in the guilt phase, as well as conduct nearly contemporaneous with such crimes (see, e.g., *People v Koontz* (2002) 27 C4th 1041, 1087, 119 CR2d 859; *People v Stanley* (1995) 10 C4th 764, 822–824, 42 CR2d 543) or that took place *after* the present crime. *People v Avena* (1996) 13 C4th 394, 426, 53 CR2d 301; *People v Caro* (1988) 46 C3d 1035, 1058, 251 CR 757.

The admission of violent criminal conduct occurring many years before the penalty phase is conditioned on reasonable steps to assure a fair trial, including notice of the evidence to be introduced, the opportunity to confront the available witnesses, and the requirement of proof beyond a reasonable doubt. See *People v Rundle* (2008) 43 C4th 76, 183, 74 CR3d 454; *People v Yeoman* (2003) 31 C4th 93, 136–137, 2 CR3d 186.

Factor (b) applies to crimes whose prosecution is barred by the statute of limitations. *People v Hart* (1999) 20 C4th 546, 642, 85 CR2d 132; *People v Bradford* (1997) 15 C4th 1229, 1376, 65 CR2d 145.

☛ JUDICIAL TIPS: Evidence Code §352 should not be used to exclude factor (b) evidence on the ground of staleness. *People v Anderson*, *supra*; *People v Frank* (1990) 51 C3d 718, 729, 274 CR 372. In a foundational hearing, remoteness in time may be one facet in determining whether the evidence meets the reasonable doubt standard (see §§99.32, 99.45). Evidence Code §352 retains vitality as to particular items of evidence. See, e.g., *People v Wader* (1993) 5 C4th 610, 655, 20 CR2d 788 (trial court correctly determined whether photograph of factor (b) conduct victim was substantially more prejudicial than probative); see also §§99.23–99.24.

## (4) [§99.38] Prior Adjudication

The violent criminal conduct need not have been previously adjudicated to be admissible. *People v Smith* (2007) 40 C4th 483, 527, 54 CR3d 245; *People v Carpenter* (1997) 15 C4th 312, 401, 63 CR2d 1

(evidence of unadjudicated crimes and offenses for which defendant was awaiting trial).

When there was a prior felony conviction, factor (b) evidence is admissible whether or not the prior conviction is admissible under factor (c). Thus:

- A conviction may be admitted under factor (c) and the facts underlying the conviction under factor (b). *People v Melton* (1988) 44 C3d 713, 764, 244 CR 867. The jury may consider both the conviction and the event. See §99.51.
- The inadmissibility of a conviction under factor (c) does not block the admission of appropriate factor (b) evidence. *People v Carter* (2005) 36 C4th 1114, 1146, 32 CR3d 759 (prior inadmissible because did not occur before charged murders); *People v Cox* (1991) 53 C3d 618, 689, 280 CR 692 (juvenile adjudication not admissible under factor (c), but underlying facts are); *People v Hayes* (1990) 52 C3d 577, 637, 276 CR 874.

In addition, the record of conviction of a violent crime is itself admissible under factor (b) even when it does not qualify under factor (c). *People v Bradford* (1997) 15 C4th 1229, 1374, 65 CR2d 145 (date of conviction later than date of capital offense); *People v Jackson* (1996) 13 C4th 1164, 1234, 56 CR2d 49.

The prosecution may introduce evidence of conduct more serious than what defendant admitted in a prior case. *People v Jones* (1998) 17 C4th 279, 312, 70 CR2d 793; see *People v Yeoman* (2003) 31 C4th 93, 134, 2 CR3d 186. As to the effect of an acquittal on charges based on evidence later offered under factor (b), see §99.42.

- **JUDICIAL TIP:** Defendant's stipulation to a conviction or offer to stipulate to a sanitized version of the facts does not preclude admission of the graphic details of the factor (b) crimes. *People v Ray* (1996) 13 C4th 313, 350, 52 CR2d 296.

### **(5) [§99.39] Defendant as Accomplice; Acts of Principal**

Violent criminal conduct of a third person is provable when defendant could have been charged with it as an accomplice or when necessary to present defendant's other crimes in context. *People v Bacigalupo* (1991) 1 C4th 103, 137, 2 CR2d 335.

#### **d. [§99.40] Evidence of Violence Against Person**

Under Pen C §190.3(b), only evidence of criminal activity that may involve the use, attempt to use, or threat to use violence against a person—not against property—is admissible. *People v Kirkpatrick* (1994) 7 C4th

988, 1013, 1016, 30 CR2d 818; *People v Boyd* (1985) 38 C3d 762, 776, 215 CR 1 (evidence of nonviolent escape attempt inadmissible). See *People v Lewis* (2008) 43 C4th 415, 527, 75 CR3d 588 (court assumes that making hole in cell wall involves violent injury only to property, not to a person).

Violence need not be a necessary element of a factor (b) crime as long as defendant's conduct in fact involved violence or a threat to use it. *People v Stanley* (1995) 10 C4th 764, 824, 42 CR2d 543; *People v Grant* (1988) 45 C3d 829, 850, 248 CR 444.

*Possession of weapons while in custody.* Evidence of possessing weapons in jail is admissible. *People v Mills* (2010) 48 C4th 158, 208, 106 CR3d 153; *People v Michaels* (2002) 28 C4th 486, 536, 122 CR2d 485. Illustrations:

- A sharpened plastic toothbrush. *People v Mills, supra*.
- A contraband razor. *People v Thornton* (2007) 41 C4th 391, 465, 61 CR3d 461.
- Handcuff keys. *People v Ochoa* (2001) 26 C4th 398, 448, 110 CR 324.

*Possession of weapons while not in custody.* In a noncustodial setting, illegal possession of a weapon is not necessarily an act committed with force or violence or a threat to use force. *People v Cox* (2003) 30 C4th 916, 973, 135 CR3d 272 (mere possession of guns is not a crime of violence); *People v Jackson* (1996) 13 C4th 1164, 1235, 56 CR2d 49. Weapons possession comes within factor (b) when the jury can legitimately infer an implied threat of violence from all the circumstances, including the criminal character of defendant's possession. *People v Dykes* (2009) 46 C4th 731, 777, 95 CR3d 78. Illustrations include:

- A loaded and cocked firearm available for instant use. *People v Dykes, supra* (defendant had no permit for concealed firearm).
- Knives with 7–8" blades coupled with evidence that defendant had used similar weapons to commit other crimes. *People v Michaels, supra*, 28 C4th at 536.
- A length of pipe carried by the defendant during an attempted burglary; defendant raised the pipe over his head as if to strike an occupant. *People v Farnam* (2002) 28 C4th 107, 176, 121 CR2d 106.
- Sawed-off rifles and silencers in defendant's residence. *People v Quartermain* (1997) 16 C4th 600, 631, 66 CR2d 609.
- Possession of a pistol by a parolee. *People v Bacon* (2010) 50 C4th 1082, 1127, 116 CR3d 723.

A burglary may be a crime of violence when defendant had used violence in other burglaries that led to the capital offenses, possessed knives, stalked victims, and other evidence. *People v Prince* (2007) 40 C4th 1179, 1292, 57 CR3d 543.

A statement that a certain person would have to be killed is not a threat. *People v Walker* (1988) 47 C3d 605, 638–639, 253 CR 863. A threat of death or great bodily injury need not be unconditional as long as it conveys gravity of purpose and immediate prospect of execution. *People v Bolin* (1998) 18 C4th 297, 336–340, 75 CR2d 412 (threat in violation of Pen C §422).

Evidence of membership in a white supremacist gang is admissible only if it is relevant to show a specific violent crime. *Dawson v Delaware* (1992) 503 US 159, 112 S Ct 1093, 117 L Ed 2d 309; *People v Richardson* (2008) 43 C4th 959, 1030, 77 CR3d 163.

#### e. Restrictions

##### (1) [§99.41] Crimes in Present Case

Factor (b) applies to crimes of which defendant was convicted during the guilt phase as long as they involved violence or the threat of violence. *People v Prince* (2007) 40 C4th 1179, 1292, 57 CR3d 543. The jury may not, however, double count evidence of such crimes under both factors (a) and (b). *People v Miranda* (1987) 44 C3d 57, 106, 241 CR 594; see *People v Prince*, *supra*.

##### (2) [§99.42] Acquittal

The prosecution may not use evidence of crimes for which defendant was prosecuted and acquitted. Pen C §190.3; *People v Hernandez* (2003) 30 C4th 835, 871, 877, 134 CR2d 602 (error prejudicial taken together with other errors); *People v Jennings* (1991) 53 C3d 334, 389–390, 279 CR 780. This provision of Pen C §190.3 has been narrowly construed. *People v Monterroso* (2004) 34 C4th 743, 777, 22 CR3d 1. An acquittal requires a judicial determination of the merits. *People v Lewis* (2001) 25 C4th 610, 658, 106 CR2d 629; *People v Jennings*, *supra*. The following are not acquittals within Pen C §190.3:

- A dismissal under a plea bargain or a plea to a lesser offense. *People v Garceau* (1993) 6 C4th 140, 199, 24 CR2d 664; *People v Melton* (1988) 44 C3d 713, 755, 244 CR 867.
- A dismissal on the prosecutor's motion for insufficient evidence. *People v Koontz* (2002) 27 C4th 1041, 1087, 119 CR2d 859.

☛ JUDICIAL TIP: A dismissal for this reason should underscore concern at the preliminary inquiry about the sufficiency of the evidence under factor (b).

- A disposition in another state that is an acquittal under the law of that state but not a determination of the merits. *People v Bacigalupo* (1991) 1 C4th 103, 132–134, 2 CR2d 335.
- A dismissal of parole or probation revocation charges on the merits. See *People v Arias* (1996) 13 C4th 92, 164, 51 CR2d 770.
- An expungement or setting aside of a conviction on successful completion of a sentence. *People v Pride* (1992) 3 C4th 195, 256–257, 10 CR2d 636; *People v Douglas* (1990) 50 C3d 468, 529, 268 CR 126.
- A mistrial after inability of the jury to reach a verdict. *People v Jennings, supra*, 53 C3d at 390.
- A dismissal under a [Pen C §995](#) motion. *People v Ghent* (1987) 43 C3d 739, 774, 239 CR 82.
- A dismissal under [Pen C §1385](#). *People v Monterroso, supra*, 34 C4th at 777.
- Repeated dismissals that have the effect of barring prosecution of the offense. *People v Medina* (1990) 51 C3d 870, 907, 274 CR 849. A grand jury's refusal to indict. *People v Stitely* (2005) 35 C4th 514, 563, 26 CR3d 1.

An acquittal on the merits bars evidence of lesser included offenses except those for which defendant was in fact convicted. *People v Cain* (1995) 10 C4th 1, 70–71, 40 CR2d 481; *People v Sheldon* (1989) 48 C3d 935, 950–951, 258 CR 242.

- ➡ JUDICIAL TIP: When the exception applies, the evidence should be limited to the facts supporting the lesser offense. For example, if a defendant who was charged with felony battery causing serious injury was convicted by an earlier jury of misdemeanor battery, evidence of serious injury should probably be excluded under factor (b). See *People v Cain, supra*.

#### f. [§99.43] Victim Impact Evidence

The prosecution may present victim impact evidence as to factor (b) conduct. See, e.g., *People v Davis* (2009) 46 C4th 539, 617, 94 CR3d 322; *People v Holloway* (2004) 33 C4th 96, 143, 14 CR3d 212 (victim kept gun under pillow long after assault by defendant); *People v Garceau* (1993) 6 C4th 140, 201, 24 CR2d 664.

- ➡ JUDICIAL TIP: Many judges do not permit such evidence to range as widely as that pertaining to victims of the primary offense. Judges' discretion under factor (b) is probably greater. See *People v Carpenter* (1997) 15 C4th 312, 399–401, 63 CR2d

1. Some judges are inclined to keep out evidence of an indirect or unforeseeable impact. See *People v Holloway*, *supra*.

**g. [§99.44] Context Evidence**

Evidence that does not qualify under factor (b)—for instance, a nonviolent crime or an injury to an animal—is admissible to provide context for evidence that does qualify, when it is part of “a continuous course of criminal activity.” *People v Cooper* (1991) 53 C3d 771, 841, 281 CR 90; *People v Melton* (1988) 44 C3d 713, 757, 244 CR 867. For example,

- Evidence of dog poisoning is admissible to give context to criminal threats to harm dog owner’s daughter. *People v Kirkpatrick* (1994) 7 C4th 988, 1013–1014, 30 CR2d 818.
- Evidence of possessing cocaine and stolen property is admissible as part of a continuous course of conduct culminating in forcible resistance of arrest. *People v Livaditis* (1992) 2 C4th 759, 775–777, 9 CR2d 72.

The jury may consider the nonviolent crime as an additional aggravating factor when it was committed in a single course of conduct with the violent crime. *People v Cowan* (2010) 50 C4th 401, 496, 113 CR3d 850.

As to the applicability of Evid C §352 to such evidence and for suggestions for reducing its prejudicial effects, see §99.32.

**h. [§99.45] Burden of Proof**

The prosecution has the burden of proving factor (b) criminal conduct beyond a reasonable doubt. *People v Jackson* (1996) 13 C4th 1164, 1239, 56 CR2d 49; *People v Robertson* (1982) 33 C3d 21, 53–55, 188 CR 77. Exceptions include

- When defendant was (1) convicted of the factor (b) crime, (2) the conviction is proved under factor (c), and (3) the factor (b) testimony is limited to the facts underlying the conviction. *People v Bacon* (2010) 50 C4th 1082, 1122–1124, 116 CR3d 723. See *People v Morales* (1989) 48 C3d 527, 566, 257 CR 64.
- When the evidence was admitted for another reason and the prosecution does not rely on it under factor (b). *People v Morales*, *supra*; *People v Williams* (1988) 44 C3d 883, 958, 245 CR 336. This is often true of rebuttal evidence.

Jury unanimity is required only as to the penalty decision; an individual juror who finds the factor (b) evidence to be true beyond a reasonable doubt may properly consider it in deciding whether to vote for

a death sentence. *People v Butler* (2009) 46 C4th 847, 875–876, 95 CR3d 376; *People v Caro* (1988) 46 C3d 1035, 1057, 251 CR 757; CALCRIM 764; CALJIC 8.87. The jurors need not agree on whether any particular violent criminal activity occurred. *People v Dykes* (2009) 46 C4th 731, 799, 95 CR3d 78; *People v Yeoman* (2003) 31 C4th 93, 164, 2 CR3d 186.

#### 4. Factor (c): Prior Felony Conviction

##### a. [§99.46] Introduction; Meaning of “Prior”

Penal Code §190.3(c) permits proof of any “prior felony conviction” as an aggravating circumstance. Admissibility hinges on the construction of the three words just quoted. The meaning of “prior” is discussed below, of “felony” in the following section, and of “conviction” in §99.48.

To be considered a prior under Pen C §190.3(c), the conviction must have been entered before commission of the capital offense. *People v Avena* (1996) 13 C4th 394, 426, 53 CR2d 301; *People v Balderas* (1985) 41 C3d 144, 201, 222 CR 184. The court should instruct that factor (c) applies only to criminal activity other than that for which defendant was convicted in the present proceeding. *People v Rogers* (2006) 39 C4th 826, 898, 48 CR3d 1.

##### b. [§99.47] Meaning of “Felony”

The conviction is admissible if it was for a felony under the laws of the convicting state. *People v Bacigalupo* (1991) 1 C4th 103, 139, 2 CR2d 335; *People v Lang* (1989) 49 C3d 991, 1038, 264 CR 386. It is immaterial that the same offense would be only a misdemeanor in California. *People v Bacigalupo*, *supra*.

Conviction of a wobbler reduced to a misdemeanor is not a felony conviction. See *People v Ramirez* (1990) 50 C3d 1158, 1187, 270 CR 286.

A conviction for an offense that is no longer punishable as a felony is probably inadmissible. See *People v Price* (1991) 1 C4th 324, 470, 3 CR2d 106 (conviction for marijuana possession inadmissible in light of Health & S C §11361.7(a)).

##### c. [§99.48] Meaning of “Conviction”

A juvenile adjudication is not a conviction under Pen C §190.3(c). *People v Lewis* (2008) 43 C4th 415, 530, 75 CR3d 588; *People v Burton* (1989) 48 C3d 843, 861–862, 258 CR 184 (but evidence of underlying conduct admitted under factor (b)). See *People v Combs* (2004) 34 C4th 821, 860, 22 CR3d 61. When a juvenile is tried as an adult, found guilty, and committed to the California Department of Corrections and Rehabilitation’s Division of Juvenile Justice (formerly California Youth Authority), the conviction is admissible. See *People v Williams* (2010) 49

C4th 405, 462, 111 CR3d 589; *People v Pride* (1992) 3 C4th 195, 256, 10 CR2d 636.

A conviction after a plea of no contest is admissible. Pen C §1016; *People v Adcox* (1988) 47 C3d 207, 254, 253 CR 55; *People v Belmontes* (1988) 45 C3d 744, 809, 248 CR 126.

A reversed or invalidated conviction is inadmissible. *Johnson v Mississippi* (1988) 486 US 578, 108 S Ct 1981, 100 L Ed 2d 575; see *People v Horton* (1995) 11 C4th 1068, 1135, 47 CR2d 516.

☛ JUDICIAL TIP: Reversal or invalidation does not preclude the admission of proper factor (b) evidence concerning the same crime. See *Johnson v Mississippi*, *supra*; §99.38.

A conviction that has been set aside or expunged as a result of completing the sentence is admissible. *People v Pride*, *supra*, 3 C4th at 256–257.

#### d. [§99.49] Evidence and Standard of Proof

Under factor (c), only the fact of the conviction is admissible, not evidence of the underlying crime (*People v Riggs* (2008) 44 C4th 248, 316, 79 CR3d 648; *People v Livaditis* (1992) 2 C4th 759, 776, 9 CR2d 72), other than the date on which defendant committed it (*People v Bacigalupo* (1991) 1 C4th 103, 140, 2 CR2d 335).

Inadmissible evidence includes charging documents and evidence that defendant violated probation on which he had been placed for the prior conviction. *People v Kaurish* (1990) 52 C3d 648, 703, 276 CR 788.

The court has no discretion under Evid C §352 to preclude all proof of a prior conviction. *People v Bacigalupo*, *supra*; see *People v Seaton* (2001) 26 C4th 598, 677, 110 CR2d 441 (priors not excludable on ground of staleness). Discretion remains to limit the form and manner in which the prosecution presents the case. *People v Bacigalupo*, *supra* (court properly minimized prejudice by limiting evidence to court records).

The standard of proof is beyond a reasonable doubt. *People v Williams* (2010) 49 C4th 405, 459, 111 CR3d 589.

#### e. [§99.50] Stipulation; Waiver

Defendants often stipulate to the prior conviction. They may properly do so without a waiver of rights. *People v Holt* (1997) 15 C4th 619, 690, 63 CR2d 782. A stipulation does not preclude introduction of factor (b) testimony. *People v Karis* (1988) 46 C3d 612, 640, 250 CR 659.

#### f. [§99.51] Relation to Factors (a) and (b)

*Factor (a)*. Factor (a) has two components: (1) the circumstances of the crime of which defendant was convicted in the guilt phase and (2) any

special circumstances that were found to be true. [Pen C §190.3\(a\)](#). Factor (c) is always distinct from the first component because it involves a crime that preceded the current offense. See [§99.46](#).

However, factor (c) overlaps the second component when the prior conviction is for first or second degree murder and was found as a special circumstance under [Pen C §190.2\(a\)\(2\)](#). The penalty phase jury may count such a prior conviction only once and should be so admonished on request. See California Judges Benchguide 98: *Death Penalty Benchguide: Pretrial and Guilt Phase* §98.61 (Cal CJER).

*Factor (b).* A single underlying event may properly be considered by the jury under both factors (b) and (c). *People v Gallego* (1990) 52 C3d 115, 198, 276 CR 679; *People v Melton* (1988) 44 C3d 713, 764, 244 CR 867.

**g. [§99.52] Chart: Objections to Factor (c) Evidence**

Objection (or evidence objected to)	Suggested Ruling	See
Charging documents	Sustain	<a href="#">§99.49</a>
Conviction did not precede present offense	Sustain	<a href="#">§99.46</a>
Conviction was reversed or invalidated	Sustain	<a href="#">§99.48</a>
Conviction was set aside or expunged on completion of sentence	Overrule	<a href="#">§99.48</a>
<a href="#">Evid C §352</a>	Overrule objection aimed at all evidence of a prior; sustain as to particular evidence to minimize prejudice, repetition, or undue consumption of time	<a href="#">§§99.25, 99.49</a>
Juvenile adjudication	Sustain	<a href="#">§99.48</a>
Juvenile tried as adult	Overrule	<a href="#">§99.48</a>
No contest plea	Overrule	<a href="#">§99.48</a>
Not defendant's conviction	Hold foundational hearing	
Offense no longer punishable as felony	Probably sustain	<a href="#">§99.47</a>
Offense not a felony in California	See out-of-state conviction, below	

Objection (or evidence objected to)	Suggested Ruling	See
Out-of-state conviction	Overrule as long as offense is a felony in the convicting jurisdiction	§99.47
Overlaps factor (b)	Overrule	§§99.38, 99.51
Overlaps special circumstance	Overrule, but instruct on request that jury may count it only once	§99.51
Probation or parole violation	Sustain as to evidence of violation	§99.49
Remoteness, staleness	Overrule	§99.49
Underlying facts	Sustain	§99.49
Wobbler	Sustain when wobbler was reduced to misdemeanor	§99.47

➡ JUDICIAL TIP: Evidence inadmissible under factor (c) may be admissible under factor (b). See §§99.38, 99.48

### 5. [§99.53] Factors (d)–(j)

Penal Code §190.3(d)–(j) poses few evidentiary problems. Defense evidence that fails to qualify under one of these factors is often admissible under factor (k). For example, acting under “extreme mental or emotional disturbance” is the mitigating factor (d), but evidence of less severe psychiatric problems is admissible under Pen C §190.3(k). See *People v Nakahara* (2003) 30 C4th 705, 724, 134 CR2d 223; *People v Clark* (1992) 3 C4th 41, 163, 10 CR2d 554. Again, Pen C §190.3(f) makes a reasonable belief that the act was morally justified mitigating, but the jury can also consider evidence of an unreasonable belief. *People v Murtishaw* (1989) 48 C3d 1001, 1017, 258 CR 821.

#### ➡ JUDICIAL TIPS:

- Defendant is free to introduce mitigating evidence of a wide range of mental states short of insanity; care is often needed to avoid limiting the jury’s consideration of them. See *People v Babbitt* (1988) 45 C3d 660, 720, 248 CR 69.
- The prosecutor should not be permitted to argue that the absence of factor (d), (e), (f), (g), or (h) is aggravating. See §99.76.

- The prosecution can introduce evidence of defendant’s mental condition as part of its case in chief only when it is clearly related to one of the aggravating factors. *People v Smith* (2005) 35 C4th 334, 352–355, 25 CR3d 554; see §99.28.

## 6. Factor (k): Other Circumstances Extenuating Gravity of Crime

### a. [§99.54] Determining Relevance

Mitigating evidence seeks “to elicit the sympathy or pity of the jury.” *People v Grant* (1988) 45 C3d 829, 860, 248 CR 444. Factor (k) gives defendant broad leeway to introduce relevant mitigating evidence, including reliable hearsay. See §§99.21, 99.25.

To be relevant, the evidence must relate to the *particular* defendant’s character, background, personal history or record, or to the circumstances of the crime; the evidence must help the jury to make an *individualized* assessment of the appropriateness of the death penalty for the particular defendant. *People v Wright* (1990) 52 C3d 367, 431, 276 CR 731 (statistics on number of special circumstance cases in which death penalty imposed irrelevant); *People v Grant*, *supra* (testimony on manner of performing executions irrelevant).

A short-hand definition of relevant mitigating evidence is that which bears on defendant’s character or prior record, or on the circumstances of the offense. *People v Zapien* (1993) 4 C4th 929, 989, 17 CR2d 122; *Lockett v Ohio* (1978) 438 US 586, 604, 98 S Ct 2954, 57 L Ed 2d 973. See also *People v Frye* (1998) 18 C4th 894, 1016–1017, 77 CR2d 25 (evidence need only have “some tendency” to reduce culpability for prior offense or mitigate claim of pattern of violence); *People v Mickle* (1991) 54 C3d 140, 193, 194, 284 CR 511 (testimony bearing on defendant’s moral culpability and overall character and humanity).

For illustrations of relevant and irrelevant evidence, see §§99.55–99.64.

The defendant may instruct counsel not to present mitigating evidence. See *Schriro v Landrigan* (2007) 550 US 465, 475–477, 127 S Ct 1933, 167 L Ed 2d 836.

- ☛ JUDICIAL TIP: When you learn of such an instruction, make a very clear record.

### b. Illustrations of Relevant Evidence

#### (1) [§99.55] Defendant’s Childhood

Extensive evidence of defendant’s troubled childhood is routinely admitted. See, e.g., *Abdul-Kabir v Quarterman* (2007) 550 US 233, 240–242, 127 S Ct 1654, 167 L Ed 2d 585 (such evidence tends to prove that

defendant's violent propensities were caused by factors beyond his control); *People v Sanchez* (1995) 12 C4th 1, 22–23, 47 CR2d 843 (testimony by friends, relatives, and a social anthropologist to the effect that defendant's dysfunctional and poverty-stricken migratory family life severely hampered his ability to lead a productive life); *People v Ramirez* (1990) 50 C3d 1158, 1172–1173, 270 CR 286 (father's alcoholism, defendant's serious childhood illnesses, family's economic hardship, parents' divorce, effect of father's death on defendant).

The background of the defendant's family is material to the extent that it relates to the background of the defendant. *People v Rowland* (1992) 4 C4th 238, 279, 14 CR2d 377.

## (2) [§99.56] Mental and Psychological Condition

Appropriate subjects include defendant's retardation (*Penry v Lynaugh* (1989) 492 US 302, 322, 109 S Ct 2934, 106 L Ed 2d 256), learning disabilities, and low IQ (*Tennard v Dretke* (2004) 542 US 274, 287, 124 S Ct 2562, 159 L Ed 2d 384 (impaired intellectual functioning is inherently mitigating); *People v Ramirez* (1990) 50 C3d 1158, 1172, 270 CR 286), as well as psychological disorders such as sexual psychopathology (*People v Mickle* (1991) 54 C3d 140, 193, 284 CR 511; *People v Ramirez, supra*) and posttraumatic stress disorder (*People v Lucero* (1988) 44 C3d 1006, 1029, 245 CR 185). As to retardation, see also Pen C §1376; *Atkins v Virginia* (2002) 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (mentally retarded persons may not be executed).

More broadly, factor (k) permits the jury to consider any mental or emotional condition. *People v Arias* (1996) 13 C4th 92, 189, 51 CR2d 770. See *People v Smithey* (1999) 20 C4th 936, 1005, 86 CR2d 243 (court instructed jury to consider evidence of retardation and mental age in extenuation).

### ☛ JUDICIAL TIPS:

- The court should not restrict testimony to conditions that were a cause of the crime or are a defense to it. See *Penry v Lynaugh, supra*, 492 US at 322–323 (jury might see retarded defendant as less morally culpable, even if retardation did not affect ability to deliberate); *People v Brown* (2003) 31 C4th 518, 577–578, 3 CR3d 145 (error to exclude evidence of childhood hyperactivity; defense need not show correlation between hyperactivity and later violence).
- The defendant should be allowed to testify how drug use affected his life. *People v Roldan* (2005) 35 C4th 646, 738–739, 27 CR3d 360.

- Evidence of improper diagnosis and treatment of defendant's condition should be permitted. *People v Mickle, supra*.
- Objections based on Evid C §352 should be handled with considerable caution. See §99.25.

### (3) [§99.57] Positive Behavior and Traits

Evidence of defendant's good deeds, behavior, and traits is proper under factor (k). See, e.g., *People v Ramirez* (1990) 50 C3d 1158, 1173, 270 CR 286 (exemplary conduct as firefighter while in jail); *Hitchcock v Dugger* (1987) 481 US 393, 397, 107 S Ct 1821, 95 L Ed 2d 347 (defendant pictured as affectionate uncle); *People v Espinoza* (1992) 3 C4th 806, 815, 12 CR2d 682 (defendant as born-again Christian and loving parent); *People v Guzman* (1988) 45 C3d 915, 932, 248 CR 467, overruled on other grounds in 25 C4th 1046, 1069 n13 (defendant finished high school during prior imprisonment); *People v Smith* (2003) 30 C4th 581, 627–628, 134 CR2d 1 (defendant's expression of remorse, but not expert testimony concerning weight jury should give to it). Family members may also testify about their feelings toward defendant. *People v Sanders* (1995) 11 C4th 475, 545, 46 CR2d 751.

### (4) [§99.58] Poetry and Paintings

Defendant's jailhouse poetry is admissible as long as the surrounding circumstances "do not warrant a conclusion that defendant wrote the poetry with a motive to manufacture evidence." *People v Harris* (1984) 36 C3d 36, 71, 201 CR 782. A defendant has also been allowed to testify about his painting and to display some of his work to the jury. See *People v Guzman* (1988) 45 C3d 915, 932, 248 CR 467, overruled on other grounds in 25 C4th 1046, 1069 n13.

- JUDICIAL TIP: Foundational hearings regarding this type of evidence are best conducted before penalty phase opening statements. Judges often admit poetry and other art produced by the defendant.

### (5) [§99.59] Future Adjustment to Prison Life

Testimony that defendant would adjust well to prison life and would not pose a danger there is proper. *Skipper v South Carolina* (1986) 476 US 1, 5, 106 S Ct 1669, 90 L Ed 2d 1; *People v Fudge* (1994) 7 C4th 1075, 1117, 31 CR2d 321. See *Ayers v Belmontes* (2006) 549 US 7, 127 S Ct 469, 166 L Ed 2d 334 (jury entitled to consider evidence that defendant would make a positive contribution to society in prison). But testimony that defendant would be confined so securely that he would be unlikely to engage in violence is inadmissible. *People v Martinez* (2010) 47 C4th 911,

963, 105 CR3d 131; *People v Ervine* (2009) 47 C4th 745, 794, 102 CR3d 786.

- JUDICIAL TIP: *Prosecution* evidence of future dangerousness is inadmissible, at least during the prosecution’s case-in-chief. *People v Ervine*, *supra*, 47 C4th at 797; *People v Murtishaw* (1981) 29 C3d 733, 775, 175 CR 738. The prosecution should not be allowed to inject the issue into the trial by cross-examining defense witnesses who did not testify about future dangerousness. *People v Boyette* (2002) 29 C4th 381, 447, 127 CR2d 544.

### (6) [§99.60] Opinions on Sentence

Family members and friends of defendant may express their views on the appropriateness of sentencing defendant to death; such testimony bears on defendant’s character. *People v Ochoa* (1998) 19 C4th 353, 456, 79 CR2d 408; *People v Mickle* (1991) 54 C3d 140, 194, 284 CR 511. See *People v Davis* (2009) 46 C4th 539, 619, 94 CR3d 322.

- JUDICIAL TIP: Such testimony should not be confused with generally impermissible testimony that executing defendant would stigmatize his or her family. See §99.64.

Defendant may also testify about what sentence he or she should receive. *People v Whitt* (1990) 51 C3d 620, 647, 274 CR 252 (questions such as “Do you want to live?” and “Why do you deserve to live?” are relevant). Unless the defense has opened this area, cross-examination regarding such opinions is improper. *People v Danielson* (1992) 3 C4th 691, 715, 13 CR2d 1, overruled on other grounds in 25 C4th 1046, 1069 n13.

Evidence of the *victim*’s opposition to capital punishment is generally irrelevant because it does not bear on *defendant*’s character. *People v Lancaster* (2007) 41 C4th 50, 98, 58 CR3d 608.

As to defendant requesting a death sentence, see §99.74.

### (7) [§99.61] Lingering Doubt

Defendant may introduce evidence material to any lingering or residual doubt concerning his or her guilt. See *People v Hawkins* (1995) 10 C4th 920, 966–967, 42 CR2d 636; *People v Cox* (1991) 53 C3d 618, 677, 280 CR 692. The right rests on the construction of factors (a) and (k); it has no constitutional basis. *Franklin v Lynaugh* (1988) 487 US 164, 174, 108 S Ct 2320, 101 L Ed 2d 155; *People v Gay* (2008) 42 C4th 1195, 1220, 73 CR3d 442; see *Oregon v Guzek* (2006) 546 US 517, 525–526, 126 S Ct 1226, 163 L Ed 2d 1112.

However, defendant may not use lingering doubt to introduce otherwise inadmissible evidence. *People v Zapien* (1993) 4 C4th 929, 989,

17 CR2d 122 (evidence of plea bargain and prosecutorial misconduct is irrelevant under factor (k) and therefore inadmissible for lingering doubt).

The court in *In re Gay* (1998) 19 C4th 771, 814, 80 CR2d 765, said that a defendant may not retry the guilt phase in an effort to create lingering doubt. This proposition no longer applies to the retrial of the penalty phase and it is doubtful whether it applies to any penalty phase trial. *People v Gay, supra*, 42 C4th at 1217–1221 (prejudicial error to exclude evidence that defendant was not shooter), 1228 (conc. op.).

For lingering doubt argument, see §99.89; for instructions, see §99.115.

### c. Illustrations of Irrelevant Evidence

#### (1) [§99.62] Manner of Execution and Other Evidence Not Based on Case at Hand

Inadmissible evidence includes:

- Explanations of how the death penalty is carried out. *People v Cox* (2003) 30 C4th 916, 969, 135 CR2d 272; *People v Fudge* (1994) 7 C4th 1075, 1123, 31 CR2d 321.

☛ JUDICIAL TIP: Descriptions of executions are also improper during argument. *People v Collins* (2010) 49 C4th 175, 233, 110 CR3d 384; *People v Sanders* (1995) 11 C4th 475, 555, 46 CR2d 751.

- Testimony about miscarriages of justice in other capital cases. *People v Alcala* (1992) 4 C4th 742, 806–807, 15 CR2d 432; *People v Pride* (1992) 3 C4th 195, 261, 10 CR2d 636.

☛ JUDICIAL TIP: During argument, some reference to other cases may be permissible. See *People v Marshall* (1996) 13 C4th 799, 851–853, 55 CR2d 347.

- Statistics designed to show that the death penalty is an ineffective deterrent. *People v Thompson* (1988) 45 C3d 86, 138–139, 246 CR 245. For argument on deterrence, see §99.86.
- Statistics on the incidence of death judgments relative to the number of death penalty cases. *People v Wright* (1990) 52 C3d 367, 431, 276 CR 731.
- A videotape showing “a day in the life” of a prisoner (*People v Daniels* (1991) 52 C3d 815, 876–878, 277 CR 122) and other descriptions of prison life offered to dispel any notion that a LWOP sentence is lenient. *People v Quartermain* (1997) 16 C4th 600, 632, 66 CR2d 609; *People v Thompson, supra*, 45 C3d at 138.

- A jury view of San Quentin prison in person or by videotape. *People v Osband* (1996) 13 C4th 622, 713, 55 CR2d 26; *People v Lucas* (1995) 12 C4th 415, 499, 48 CR2d 525. See also *People v Rundle* (2008) 43 C4th 76, 186, 74 CR3d 454 (conditions of prison confinement); *People v Brown* (2003) 31 C4th 518, 575, 3 CR3d 145 (evidence of security surrounding life prisoner in prison inadmissible).
- ☛ JUDICIAL TIP: It is sometimes useful to ask whether the proffered evidence is unique to the particular defendant or whether it would also apply to other capital case defendants. The latter is generally inadmissible.

## (2) [§99.63] Sentences of Codefendants

Evidence of a sentence imposed on a codefendant has no bearing on defendant's character, background, or record and is therefore irrelevant. *People v Brown* (2003) 31 C4th 518, 562, 3 CR3d 145; *People v McDermott* (2002) 28 C4th 946, 1004–1005, 123 CR2d 654 (defendant may not argue that accomplice sentences justify leniency even though prosecution told jury of sentences at guilt phase). This is equally true of plea offers to a codefendant. *People v Cain* (1995) 10 C4th 1, 62, 40 CR2d 481. On a plea offer made to defendant, see §99.25.

## (3) [§99.64] Impact of Execution on Defendant's Family

Members of defendant's family "may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." *People v Ochoa* (1998) 19 C4th 353, 456, 79 CR2d 408; *People v Williams* (2008) 43 C4th 584, 644, 75 CR3d 691. Such testimony may also be offered by friends and others who have a significant relationship with the defendant. *People v Smith* (2005) 35 C4th 334, 367, 25 CR3d 554 (person who had tutored defendant for three years).

The defendant may offer testimony from family members that they love him or her and want him or her to live; testimony of this nature is indirect evidence of defendant's character. *People v Ochoa, supra*, 19 C4th at 456. However, evidence of the impact of the execution on defendant's family is inadmissible when it does not bear on defendant's character or humanity. 19 C4th at 456; *People v Bennett* (2009) 45 C4th 577, 600–603, 88 CR3d 131 (testimony concerning stigma of execution inadmissible). Sympathy for defendant's family is not a mitigating circumstance unless it is based on evidence of defendant's character or record. See *People v Alexander* (2010) 49 C4th 846, 929–931, 113 CR3d 190.

It is improper cross-examination to ask defendant's mother if she had thought about how the parents of the murder victims feel or to imply that religious authority supported imposition of the death penalty. *People v Navarette* (2003) 30 C4th 458, 514–515, 133 CR2d 89; see CALCRIM 763, last bracketed paragraph.

## 7. Prosecution Rebuttal

### a. [§99.65] Basic Principles

Rebuttal evidence offered by the prosecution need not fall within the statutory aggravating factors (*People v Hawthorne* (2009) 46 C4th 67, 95, 92 CR3d 330; *People v Daniels* (1991) 52 C3d 815, 883, 277 CR 122) as long as it is relevant (see §99.66). In fact, evidence that does fall within an aggravating factor should normally be introduced during the prosecution's case-in-chief and not held back for rebuttal.

For example, in appropriate situations, evidence is admissible to show:

- Nonviolent offenses committed by defendant. *People v Mitcham* (1992) 1 C4th 1027, 1072, 5 CR2d 230; *People v Daniels*, *supra*, 52 C3d at 882–883. However, such evidence is not always relevant. See §99.66.
- Future dangerousness, when defense testimony has addressed this topic. See §§99.59, 99.68.
- Misconduct by defendant that lacks some or all of the elements of a crime and that is provable beyond a reasonable doubt. *People v Rodriguez* (1986) 42 C3d 730, 792, 230 CR 667.

For limitations on arguing the effects of rebuttal evidence, see §99.95.

### b. [§99.66] Relevance

Prosecution rebuttal evidence must be relevant in the sense of tending to disprove a fact of consequence as to which defendant has introduced evidence. *People v Boyd* (1985) 38 C3d 762, 776, 215 CR 1; Evid C §210.

For example, evidence that defendant was convicted of offenses involving dishonesty, but not violence, is not relevant to rebut testimony that defendant was not a violent person. See *People v Siripongs* (1988) 45 C3d 548, 576–577, 247 CR 729. Standing alone, evidence of defendant's membership in the Aryan Brotherhood is not relevant to rebut defendant's character evidence. *Dawson v Delaware* (1992) 503 US 159, 167–168, 112 S Ct 1093, 117 L Ed 2d 309 (prosecution offered no details); but see *People v Fierro* (1991) 1 C4th 173, 237, 3 CR2d 426 (character witness cross-examined about knowledge of defendant's membership in youth gangs).

**c. [§99.67] Scope**

When defendant has introduced evidence of a particular incident or character trait, rebuttal must relate directly to that incident or trait; evidence of good character will not open the door to any and all bad character evidence. *In re Lucas* (2004) 33 C4th 682, 733, 16 CR3d 631; *People v Rodriguez* (1986) 42 C3d 730, 792, 230 CR 667.

Broad defense evidence permits broad rebuttal. See, e.g., *People v Mitcham* (1992) 1 C4th 1027, 1072, 5 CR2d 230 (testimony that pictured defendant as well-behaved youth makes juvenile record admissible).

Courts have considerable discretion as to the admission of rebuttal evidence (*People v Raley* (1992) 2 C4th 870, 912, 8 CR2d 678); this may help explain apparent variations in reported decisions. “Have you heard” questions about acts or conduct inconsistent with the witness’s testimony are permissible as long as the prosecutor believes in good faith that the acts actually took place, *People v Chatman* (2006) 38 C4th 344, 404, 42 CR3d 621. On the other hand, it is improper to ask whether a witness would like to see a report of inconsistent conduct by the defendant or whether the witness was aware of another side of the defendant or “bad things” he had done. *People v Loker* (2008) 44 C4th 691, 717–723, 80 CR3d 630 (such questions characterize defendant instead of referring to specific conduct).

**(1) [§99.68] Illustrations: Rebuttal Evidence Within Proper Scope**

<b>Defense</b>	<b>Rebuttal</b>	<b>Authority</b>
Defendant became born-again Christian after the crime.	Defendant suborned perjury after his alleged conversion.	<i>People v Espinoza</i> (1992) 3 C4th 806, 826, 12 CR2d 682; see <i>People v Ramos (Ramos III)</i> (1997) 15 C4th 1133, 1172–1173, 64 CR2d 892 (witness who testifies to defendant’s religious recommitment in prison may be asked whether she knew defendant possessed weapons in prison).
Defendant was gentle and in the habit of avoiding violent confrontations.	Defendant once reached for a shotgun when stopped by a police officer.	<i>People v Rodriguez</i> (1986) 42 C3d 730, 791–792, 230 CR 667.
Defendant was kind and considerate.	Defendant assaulted a woman.	<i>People v Visciotti</i> (1992) 2 C4th 1, 69, 5 CR2d 495.
Defendant was a well-behaved teenager.	Defendant committed juvenile offenses.	<i>People v Mitcham</i> (1992) 1 C4th 1027, 1072, 5 CR2d 230; <i>People v Daniels</i> (1991) 52 C3d 815, 882–883, 277 CR 122. See <i>People v Carter</i> (2003) 30 C4th 1166, 1202–1204, 135 CR2d 553.
	Defendant belonged to street gangs.	<i>People v Fierro</i> (1991) 1 C4th 173, 236–238, 3 CR2d 426. See <i>People v Jones</i> (2003) 30 C4th 1084, 1121, 135 CR2d 370.
Defendant was a good preteen.	Teenage misconduct.	<i>In re Ross</i> (1995) 10 C4th 184, 208, 40 CR2d 544.

Defense	Rebuttal	Authority
Defendant will be law-abiding in a prison environment.	Defendant will probably be dangerous to others. <sup>1</sup>	<i>People v Mattson</i> (1990) 50 C3d 826, 878, 268 CR 802; <i>People v Malone</i> (1988) 47 C3d 1, 31, 252 CR 525.
Defendant tried to commit suicide (guilt phase testimony).	Defendant did not care about the victim's family (penalty phase evidence).	<i>People v Jones</i> (2003) 29 C4th 1229, 1264–1266, 131 CR2d 468.
Defendant told psychologist that he had job in construction and had been working a month prior to arrest.	Defendant told close friend that he would rob people of their cars; defendant never mentioned working.	<i>People v Brown</i> (2003) 31 C4th 518, 578–581, 3 CR3d 145.
Good conduct in jail.	Escape plan.	<i>People v Crew</i> (2003) 31 C4th 822, 854, 3 CR3d 733.
Defendant acted under domination of codefendant.	Defendant used drugs, was abusive and evaded arrest before meeting codefendant.	<i>People v Coffman &amp; Marlow</i> (2004) 34 C4th 1, 110, 17 CR3d 710.
Defendant had brain damage.	No correlation between brain damage and committing premeditated crime of violence.	<i>People v Smith</i> (2005) 35 C4th 334, 389, 25 CR3d 554 (but brain damage is mitigating whether or not it caused murder).
Substandard upbringing, learning and physiological difficulties.	In high school, defendant taunted physically handicapped student.	<i>People v Thornton</i> (2007) 41 C4th 391, 457, 61 CR3d 461.

1. The prosecution's expert testimony must meet reliability standards; many judges doubt that individual dangerousness is predictable with any degree of accuracy.

**(2) [§99.69] Illustrations: Rebuttal Evidence Not Within Proper Scope**

<b>Defense</b>	<b>Rebuttal</b>	<b>Authority</b>
Defendant was a devout Buddhist.	Defendant committed crimes involving dishonesty.	<i>People v Siripongs</i> (1988) 45 C3d 548, 578, 247 CR 729 (beyond scope unless defense testimony states that honesty is one of the characteristics of a Buddhist). But see <i>People v Espinoza</i> (1992) 3 C4th 806, 826, 12 CR2d 682, discussed in §99.68.
Defendant suffered adverse childhood experiences.	Defendant's misconduct.	<i>In re Lucas</i> (2004) 33 C4th 682, 733, 16 CR3d 631; <i>People v Ramirez</i> (1990) 50 C3d 1158, 1193, 270 CR 286.
Defendant's childhood and family background.	Defendant's dream of harming a witness, and the witness's fear of defendant.	<i>People v Medina</i> (1995) 11 C4th 694, 769, 47 CR2d 165.
Defendant was a peaceful person.	Defendant had an armed confrontation with an unidentified man 15 years before charged offense.	<i>People v Martinez</i> (2003) 31 C4th 673, 694–695, 3 CR3d 648 (evidence worthless when witness does not know surrounding circumstances).
Good conduct in jail.	Defendant admitted murder to jailhouse informant.	<i>People v Crew</i> (2003) 31 C4th 822, 854, 3 CR3d 733.
Defendant's troubled childhood.	Defendant's crimes, fantasies, and aspirations.	<i>People v Loker</i> (2008) 44 C4th 691, 714, 80 CR3d 630.
Psychological social history, including long standing depression.	Defendant refused to cooperate with court-ordered examination.	<i>People v Wallace</i> (2008) 44 C4th 1032, 1084–1087, 81 CR3d 651.

#### d. Limitations

##### (1) [§99.70] Evidence Code §352

Unduly prejudicial evidence should be excluded. For example, witnesses may generally not be questioned about arrests; they may be questioned about convictions or criminal behavior. *People v Medina* (1995) 11 C4th 694, 769, 47 CR2d 165; *People v Anderson* (1978) 20 C3d 647, 651, 143 CR 883 (arrest evidence too prejudicial). But see *People v Clair* (1992) 2 C4th 629, 682–685, 7 CR2d 564 (Evid C §352 not violated by questioning character witness about prior rape charge against defendant).

##### (2) [§99.71] Timeliness

The prosecution may not deliberately use evidence in rebuttal that is a material part of its case-in-chief. *People v Daniels* (1991) 52 C3d 815, 859, 277 CR 122; 3 Witkin, California Evidence, *Presentation At Trial* §§71–72 (4th ed 2000). The rule is designed to prevent undue magnification of evidence by its dramatic introduction late in the trial; the rule also seeks to avoid unfair surprise. *People v Carter* (1957) 48 C2d 737, 753, 312 P2d 665.

The court has discretion to admit such evidence during rebuttal when the prosecution first discovered it near the close of its case-in-chief. *People v DeSantis* (1992) 2 C4th 1198, 1232, 9 CR2d 628.

##### (3) [§99.72] Governor’s Power To Commute

In a capital case, the prosecutor may not question witnesses or otherwise refer to the Governor’s power to commute a life sentence. *People v Ramos* (1984) 37 C3d 136, 150–159, 207 CR 800. *Ramos* extends to the cross-examination of penalty phase defense witnesses. *People v Montiel* (1993) 5 C4th 877, 931–932, 21 CR2d 705 (questions about work and good time credits “probably improper”); *People v Keenan* (1988) 46 C3d 478, 507–508, 250 CR 550.

##### (4) [§99.73] Good Faith and Other Impeachment Limitations

Questioning a defense witness about conduct by defendant inconsistent with the testimony requires a good faith belief that the acts actually took place. *People v Sandoval* (1992) 4 C4th 155, 188, 14 CR2d 342; *People v Siripongs* (1988) 45 C3d 548, 578, 247 CR 729.

- JUDICIAL TIP: Good faith is often best determined at a hearing outside the presence of the jury. *People v Eli* (1967) 66 C2d 63, 79, 56 CR 916; see *People v Ramos* (Ramos III) (1997) 15 C4th 1133, 1173–1174, 64 CR2d 892 (*Eli* hearing not needed when

prosecutor has documents concerning the conduct in issue). An offer of proof is often sufficient; a full evidentiary hearing is usually unnecessary. Judges usually ask the prosecutor to describe the basis for the belief or the source of information.

Other limitations on impeachment also apply. See, e.g., *People v Montiel* (1993) 5 C4th 877, 927, 21 CR2d 705 (impeachment by showing omission to state fact at a prior proceeding not permissible unless witness's attention called to matter at that time). On impeachment generally, see 3 Witkin, California Evidence, *Presentation At Trial* §§258–366 (4th ed 2000).

## 8. Other Evidence Matters

### a. [§99.74] Defendant Requests Death Penalty

Defendant, whether represented or in pro per, has the right to take the stand and request imposition of the death penalty. *People v Clark* (1990) 50 C3d 583, 617, 268 CR 399; *People v Guzman* (1988) 45 C3d 915, 961–963, 248 CR 467, overruled on other grounds in 25 C4th 1046, 1069 n13. Defendant may so testify even contrary to counsel's advice. *People v Nakahara* (2003) 30 C4th 705, 719, 134 CR2d 223; *People v Whitt* (1990) 51 C3d 620, 647, 274 CR 252.

#### 👉 JUDICIAL TIPS:

- On request, the jury should be instructed that it is obligated to decide for itself, based on the statutory factors, whether death is appropriate. *People v Guzman, supra*. Some judges give this instruction sua sponte in a pro per case in an effort to have the jury make a fully considered decision rather than merely acceding to defendant's suicidal wish.
- Unless defendant opens up the area of penalty, the prosecutor should not cross-examine defendant on it. See *People v Danielson* (1992) 3 C4th 691, 715, 13 CR2d 1, overruled on other grounds in 25 C4th 1046, 1069 n13.

### b. [§99.75] Failure To Present Mitigating Evidence

A pro per defendant has the right not to present mitigating evidence (*People v Bloom* (1989) 48 C3d 1194, 1218–1228, 259 CR 669), and a represented defendant may properly direct counsel not to offer such testimony as long as defendant's decision is knowing and voluntary (*People v Sanders* (1990) 51 C3d 471, 524–527, 273 CR 537). Defendants who want a death sentence will occasionally choose to forgo mitigating evidence. *People v Sanders, supra*; *People v Bloom, supra*; *People v Guzman* (1988) 45 C3d 915, 960–961, 248 CR 467, overruled on other

grounds in 25 C4th 1046, 1069 n13. *Bloom* and *Sanders* disapproved *People v Deere* (Deere I) (1985) 41 C3d 353, 360–368, 222 CR 13. See also *People v Bradford* (1997) 15 C4th 1229, 1372, 65 CR2d 145; *People v Deere* (Deere II) (1991) 53 C3d 705, 716, 280 CR 424.

☛ JUDICIAL TIPS: When such a situation comes to the court’s attention, often at the initiative of defense counsel, many judges recommend that the court take the following steps:

- (1) Ascertain from defendant what his or her wishes in this respect are. This is especially important when defense counsel state, without explanation, that they will not present mitigating evidence or argument. See *People v Snow* (2003) 30 C4th 43, 99–123, 132 CR2d 271.
- (2) Determine whether defendant’s decision is knowing and voluntary. *People v Sanders, supra*, 51 C3d at 527. This usually means finding out what defense counsel has told defendant about the existence of specific mitigating evidence, counsel’s readiness to present it, and counsel’s recommendation that it be presented.
- (3) Seek to persuade defendant to change his or her mind; encourage defendant to consult further with counsel before making a final decision. See 51 C3d at 525.
- (4) Advise defendant that his or her decision may, in fact, result in a verdict of death and will not be a basis for reversal on appeal.

On occasion defense counsel will not present mitigating evidence for other reasons. This is likely to lead to subsequent ineffective-assistance-of-counsel claims. See, e.g., *In re Ross* (1995) 10 C4th 184, 202, 40 CR2d 544; *People v Sanders, supra*, 51 C3d at 526. Trial judges usually give defense attorneys an opportunity to put their reasons on the record. See *People v Medina* (1995) 11 C4th 694, 773–774, 47 CR2d 165 (defense counsel stated on record why he did not call additional family members). A tactical decision not to present mitigating evidence is unreasonable when it is not supported by counsel’s appropriate investigation of mitigating circumstances. *Wiggins v Smith* (2003) 539 US 510, 522–523, 123 S Ct 2527, 156 L Ed 2d 471.

Defendant’s avowed intention not to present available evidence in mitigation does not require denial of a motion for self-representation. *People v Bradford, supra*.

## E. Argument

### 1. [§99.76] Absence and Effect of Mitigating Evidence

The absence of evidence to support one or more mitigating factors is not an aggravating factor. *People v Davenport* (1985) 41 C3d 247, 288–289, 221 CR 794.

The major effect of this rule is to limit argument. The prosecutor may note the inapplicability of a mitigating factor as long as he or she does not state that the absence of this evidence constitutes an aggravating factor or that it tips the penalty balance. *People v Lewis* (1990) 50 C3d 262, 281, 266 CR 834; *People v Rodriguez* (1986) 42 C3d 730, 790, 230 CR 667. Nor may the prosecutor argue that the jury should impose the death penalty unless there are factors in mitigation. *People v Earp* (1999) 20 C4th 826, 895, 85 CR2d 857. Allowing improper argument about the lack of mitigating evidence is called “*Davenport* error.” See, e.g., *People v Lucas* (1995) 12 C4th 415, 491, 48 CR2d 525; *People v Hamilton* (1989) 48 C3d 1142, 1183–1184, 259 CR 701.

☛ JUDICIAL TIP: Comment on failure to present mitigating evidence should not be allowed to become comment on defendant’s failure to testify. See *People v Avena* (1996) 13 C4th 394, 443, 53 CR2d 301.

It is not *Davenport* error to argue that defendant never expressed regret. See §99.88. It is also permissible to argue that particular defense evidence does not in fact mitigate. See, e.g., *People v Scott* (1997) 15 C4th 1188, 1220, 65 CR2d 240 (argument that evidence of defendant’s psychological evaluation did not amount to a mitigating circumstance).

However, the prosecutor may not urge the jury to consider defendant’s mitigating evidence in aggravation. *People v Kennedy* (2005) 36 C4th 595, 635, 31 CR3d 160 (improper to argue that defendant’s assertion of innocence is aggravating); *People v Frye* (1998) 18 C4th 894, 1020–1021, 77 CR2d 25 (argument that evidence of defendant’s accomplishments “cuts both ways” because it shows he had the ability “to make it” does not violate this principle); *People v Boyd* (1985) 38 C3d 762, 775–776, 215 CR 1. See §99.78 for application of this rule to character evidence.

In addition, argument must proceed from facts for which there is evidence or from inferences from those facts. *People v Ochoa* (1998) 19 C4th 353, 466, 79 CR2d 408 (improper to argue that defendant’s good record in jail might only “mean that he didn’t get caught”).

## 2. [§99.77] Age

The prosecution may argue that age is an aggravating circumstance; the defendant may argue that it is mitigating. *People v Edwards* (1991) 54 C3d 787, 844, 1 CR2d 696; see *People v Carrington* (2009) 47 C4th 145, 201–202, 97 CR3d 117. The prosecution may urge the jury to look at defendant’s sophistication, rather than his or her chronological age. *People v Box* (2000) 23 C4th 1153, 1215, 99 CR2d 69.

- ☛ JUDICIAL TIP: The defense should be permitted to urge the converse.

The prosecution may also argue “that defendant was old enough to understand the wrongfulness of his conduct.” *People v Mendoza* (2000) 24 C4th 130, 190, 99 CR2d 485. Reference to the victim’s age is permissible as a circumstance of the offense. *People v Mendoza, supra*.

A defendant who was 19 when he committed the offense may not argue that persons under 18 are not subject to the death penalty. *People v Brown* (2003) 31 C4th 518, 565, 3 CR3d 145.

### 3. [§99.78] Bad Character

The prosecutor may argue defendant’s poor character to the extent that the evidence of defendant’s crimes and other violent misconduct supports such an argument. *People v Lewis* (2001) 25 C4th 610, 672, 106 CR2d 629 (argument that defendant was manipulative); *People v Avena* (1996) 13 C4th 394, 443, 53 CR2d 301 (defendant referred to as a killing machine and as a person with no conscience). The prosecutor may not base a character argument on factor (k) evidence; such evidence can only extenuate the gravity of a crime. *People v Edelbacher* (1989) 47 C3d 983, 1033, 254 CR 586; *People v Boyd* (1985) 38 C3d 762, 775–776, 215 CR 1; see *People v Millwee* (1998) 18 C4th 96, 151, 74 CR2d 418.

The prohibition against introducing evidence of bad character during the prosecution’s case-in-chief (see §99.20) “does not prohibit the prosecutor from commenting in closing argument on reasonable inferences drawn from the properly admitted evidence.” *People v Avena, supra*. See *People v McDermott* (2002) 28 C4th 946, 1003, 123 CR2d 654 (calling defendant “a mutation of a human being” and comparing her to a mad dog and snake proper in light of evidence); *People v Farnam* (2002) 28 C4th 107, 199, 121 CR2d 106 (calling defendant a monster and “the beast who walks upright” is for most part fair comment on evidence). Nevertheless, argument should avoid the use of opprobrious terms.

Courts have said that they do not condone the use of opprobrious terms in argument. E.g., *People v Yeoman* (2003) 31 C4th 93, 149, 2 CR3d 186; *People v McDermott* (2002) 28 C4th 946, 1002, 123 CR2d 654. The operative principle, however, is that “(a)rgument may include opprobrious epithets warranted by the evidence.” *People v Zambrano* (2007) 41 C4th 1082, 1172, 63 CR3d 297.

- ☛ JUDICIAL TIP: Guard against extensive name-calling because of its inflammatory potential. See *People v Yeoman* (2003) 31 C4th 93, 148–149, 2 CR3d 186 (single reference to defendant as animal not prejudicial when rest of argument temperate).

#### 4. [§99.79] Biblical and Other Religious References

Bible quoting and other religious comments are permissible as long as they do not invoke religious authority in support of or in opposition to the death penalty. *People v Sandoval* (1992) 4 C4th 155, 194, 14 CR2d 342; *People v Wash* (1993) 6 C4th 215, 260–261, 24 CR2d 421; see *People v Roldan* (2005) 35 C4th 646, 743, 27 CR3d 360 (patent misconduct to quote Bible as approving capital punishment; creates intolerable risk that jury will abandon reason and condemn offender on grounds that have no place in judicial system). The line is drawn at that point because the jury must make the penalty determination by relying on the court’s instructions rather than on extraneous authority. *People v Sandoval*, *supra*; see *People v Jackson* (1996) 13 C4th 1164, 1242, 56 CR2d 49 (improper to suggest that there are standards of justice other than those prescribed by law that the jury should follow).

The limitation applies to defendant as well as to the prosecution. *People v Sandoval*, *supra*. It also applies in the guilt phase: “[R]eligious input has no legitimate role to play, in the process of deciding questions of fact and applying the law to the facts.” *People v Harrison* (2005) 35 C4th 208, 247, 25 CR3d 224. For jurors’ use of biblical materials, see §99.4.

In contrast to arguing that the Bible *authorizes* capital punishment, it is permissible to argue that the death penalty does not *contravene* biblical doctrine. *People v Zambrano* (2007) 41 C4th 1082, 1169, 63 CR3d 297.

##### a. [§99.80] Illustrations of Permissible Argument

Permissible argument includes:

- Prosecutor’s observation that penalty trial is not about whose side God is on, that some believe God determines punishment in the life hereafter, but that jurors must follow the law of California. *People v Arias* (1996) 13 C4th 92, 179–180, 51 CR2d 770.
- “Render unto Caesar what is Caesar’s and unto God what is God’s.” *People v Jackson* (1996) 13 C4th 1164, 1242, 56 CR2d 49 (court noted that this is the opposite of arguing for the use of religious criteria of justice).
- A brief reference to the prescription of capital punishment by Moses in the context of a short, fairly neutral history of capital punishment. *People v Williams* (1988) 45 C3d 1268, 1328, 248 CR 834.

##### b. [§99.81] Illustrations of Improper Argument

Improper argument includes:

- Stating that the Bible commands that murderers be put to death. *People v Williams* (2010) 49 C4th 405, 465–466, 111 CR3d 589.

- Commenting that the Bible says “an eye for an eye, a tooth for a tooth.” *People v Hill* (1998) 17 C4th 800, 836, 72 CR2d 656.
- Quoting or paraphrasing a biblical passage commonly understood as providing justification for the death penalty. *People v Welch* (1999) 20 C4th 701, 761, 85 CR2d 203; *People v Roybal* (1998) 19 C4th 481, 519–521, 79 CR2d 487; see *Sandoval v Calderon* (9th Cir 2001) 241 F3d 765, 775, prior decision *People v Sandoval* (1992) 4 C4th 155, 193, 14 CR2d 342.
- Extensive references to the Bible conveying the message not only that capital punishment existed in the Bible, but that it was sanctioned by it. *People v Slaughter* (2002) 27 C4th 1187, 1208–1211, 120 CR2d 477; *People v Wash* (1993) 6 C4th 215, 260, 24 CR2d 421.
- Reference to a future trial in the afterlife. *People v Poggi* (1988) 45 C3d 306, 340, 246 CR 886.

## 5. [§99.82] Comparative Judgments

Arguments that encourage comparative judgments are impermissible. See *Payne v Tennessee* (1991) 501 US 808, 823, 111 S Ct 2597, 115 L Ed 2d 720. Thus arguing that the killer of a hardworking, devoted parent should be punished more severely than the murderer of a reprobate is improper. *Payne v Tennessee, supra*.

Similarly, the court has discretion to exclude defense references to other well-known murders. *People v Farley* (2009) 46 C4th 1053, 1130, 96 CR3d 191; *People v Marshall* (1996) 13 C4th 799, 855, 55 CR2d 347. But see *People v Ervin* (2000) 22 C4th 48, 99, 91 CR2d 623 (defendant’s mother had testified that defendant was a nice person whose life should be spared; prosecutor may properly argue that to say defendant is a nice person is like saying Charles Manson is the Messiah). When the court permits defense argument that contrasts the cases of infamous serial killers, the prosecution may argue that the death penalty has been imposed in cases involving a single murder. *People v Ochoa* (2001) 26 C4th 398, 451, 110 CR2d 324. But see *People v Hughes* (2002) 27 C4th 287, 398–400, 116 CR2d 401 (prosecutor’s argument concerning three kinds of killers and brief reference to a specific mass murder case do not entitle defendant to refer to “trailside killer” and Sirhan cases, although the defense may argue that defendant is not the worst of the worst without such references).

The prosecutor may argue that the case is the most egregious one the county has ever seen. *People v Sapp* (2003) 31 C4th 240, 309, 2 CR3d 554. Arguing that the defendant is the worst of the worst is permissible in anticipation of a contrary defense argument. *People v Carasi* (2008) 44 C4th 1263, 1315–1316, 82 CR3d 265 (prosecutor linked argument to

nature of the murders); see *People v Farley*, *supra* (defendant is entitled to make a not-worst-of-the-worst argument).

Comparing defendant's crime to other *types* of murders generally, in contrast to a comparison with specific cases, is allowed. See *People v Ervine* (2009) 47 C4th 745, 800, 102 CR3d 786.

An argument that the defendant experienced hardship may be met by pointing out that witnesses with similar experiences did not commit murder. *People v Lucero* (2000) 23 C4th 692, 734, 97 CR2d 871.

## 6. [§99.83] Counsel's Personal Belief

Counsel may express personal opinions drawn from facts in evidence. *People v Gamache* (2010) 48 C4th 347, 390, 106 CR3d 771 (telling jurors that the expression "psycho babble" will never mean the same thing to them is permissible as part of argument that defendant's mental health evidence should not carry much weight); *People v Frye* (1998) 18 C4th 894, 1018, 77 CR2d 25 (permissible to describe the killings "as senseless and cold-blooded as murders come"); *People v Scott* (1997) 15 C4th 1188, 1219–1220, 65 CR2d 240 (prosecutor may argue belief that facts of record warrant death, although he or she may not state personal belief that death is proper based on matters not in evidence); *People v Frank* (1990) 51 C3d 718, 737, 274 CR 372 (argument that psychiatrist witness "is in my judgment just a hired opinion" not misconduct). See *People v Maury* (2003) 30 C4th 342, 419, 133 CR2d 561 (prosecutor's use of "I believe" before arguing that death penalty appropriate is not expression of personal belief but rhetorical device).

Arguments from personal experience or beliefs not based on facts in evidence are improper. *People v Loker* (2008) 44 C4th 691, 740, 80 CR3d 630 (improper to argue that because of the way I was raised I can't find a great deal of sympathy for the defendant). However, references to common experience, history, or literature are permissible in view of the wide latitude given to advocates during penalty closing argument. 44 C4th at 742.

Assurances, based on the record, of a witness's honesty or reliability are proper. *People v Young* (2005) 34 C4th 1149, 1198, 24 CR3d 112. But the prosecutor may not vouch personally or on behalf of the government for the appropriateness of the verdict he or she seeks. *People v Benson* (1990) 52 C3d 754, 795, 276 CR 827; *People v Anderson* (1990) 52 C3d 453, 479, 276 CR 356 (permissible when based on evidence rather than on personal belief or knowledge). However, a prosecutor's statement that "she did not ask for the death penalty 'lightly'" is unobjectionable. *People v Ayala* (2000) 24 C4th 243, 288, 99 CR2d 532.

Reading an article contending that our society needs to assign greater weight to personal accountability and punishment is permissible. *People v Bramit* (2009) 46 C4th 1221, 1242, 96 CR3d 574.

The prosecutor may not argue that defense counsel does not believe the defendant. *People v Chatman* (2006) 38 C4th 344, 385, 42 CR3d 621.

#### 7. [§99.84] Crime Described as Execution

Argument to the effect that the particular murder was “an execution” carried out with “no procedural safeguards” is proper as long as it is supported by the evidence. *People v Scott* (1997) 15 C4th 1188, 1220, 65 CR2d 240. See *People v Navarette* (2003) 30 C4th 458, 518, 133 CR2d 89 (argument that murders were brutal beyond imagination and that nothing could come close to showing their true horror proper in light of evidence).

#### 8. [§99.85] Defendant’s Demeanor

Both sides may comment on defendant’s demeanor in court; the comments may be favorable or negative. *People v Valencia* (2008) 43 C4th 268, 307–308, 74 CR3d 605. Such comment is permissible regardless of whether defendant testified or placed his character in issue. 43 C4th at 307. As to evidence of outbursts outside the presence of the jury, see *People v Lewis* (2008) 43 C4th 415, 528, 75 CR3d 588.

#### 9. [§99.86] Deterrent Effect and Cost of Death Penalty

Questions of deterrence are not for the jury and neither side should argue the death penalty’s deterrent value or its opposite. *People v Marshall* (1996) 13 C4th 799, 859, 55 CR2d 347; *People v Ghent* (1987) 43 C3d 739, 770, 239 CR 82. Similarly, counsel should not comment on the cost of carrying out a capital sentence, or on the expense of keeping defendant in prison. See *People v Marshall*, *supra*; *People v Millwee* (1998) 18 C4th 96, 154, 74 CR2d 418. It is permissible, however, to argue that a death sentence would keep the particular defendant from committing future acts of violence. *People v Bell* (1989) 49 C3d 502, 549, 262 CR 1. Urging the jury to impose the death penalty because it would be good for society is also permissible. *People v Young* (2005) 34 C4th 1149, 1222, 24 CR3d 112. On the other hand, defense counsel may not argue that an LWOP sentence would protect society. *People v Harris* (2005) 37 C4th 310, 356, 33 CR3d 509.

#### 10. [§99.87] Future Dangerousness

The prosecutor may argue that evidence that defendant would adjust well to prison is unpersuasive and that defendant would be dangerous in prison. *People v Osband* (1996) 13 C4th 622, 723, 55 CR2d 26. More broadly, argument directed to future dangerousness is permissible when it is factually supported by defendant’s history of violence. *People v Bramit* (2009) 46 C4th 1221, 1244, 96 CR3d 574; *People v Bradford* (1997) 15 C4th 1229, 1380, 65 CR2d 145. Defendant’s vicious unprovoked attack

supports an argument of future dangerousness. *People v Brown* (2003) 31 C4th 518, 553, 3 CR3d 145.

Argument that defendant might escape is improper in the absence of evidence that defendant had ever completed, attempted, or planned an escape. *People v White* (1968) 69 C2d 751, 762, 72 CR 873; see *People v Lucky* (1988) 45 C3d 259, 294 n23, 247 CR 1.

Prosecution argument that defendant is likely to be a danger in the future affects what the jury should be instructed about defendant's ineligibility for parole. See §99.117.

The defense is not permitted to argue that the prosecution failed to introduce evidence that defendant would pose problems in prison. *People v Ervine* (2009) 47 C4th 745, 797, 102 CR3d 786. This is because prosecution evidence of future dangerousness is generally inadmissible. See §99.59.

## 11. [§99.88] Lack of Remorse

The prosecution may argue that lack of remorse at the crime scene or while fleeing from it is an aggravating circumstance under factor (a). *People v Bonilla* (2007) 41 C4th 313, 356, 60 CR3d 209; *People v Pollock* (2004) 32 C4th 1153, 1184, 13 CR3d 34.

The prosecution may *not* urge that postcrime remorselessness is aggravating, but may argue that it makes remorse unavailable as a mitigating factor. *People v Bonilla*, *supra*. The prosecutor may also urge that lack of remorse is a reason to reject mitigating evidence. *People v Cook* (2006) 39 C4th 566, 611, 47 CR3d 22.

The prosecution may anticipate a defense sympathy argument by commenting on evidence that suggests defendant's lack of concern for the victim. *People v Box* (2000) 23 C4th 1153, 1215, 99 CR2d 69 (argument that defendant went to restaurant soon after murders and conducted his everyday business without acting differently); *People v Bemore* (2000) 22 C4th 809, 855, 94 CR2d 840. The prosecution may argue lack of remorse even if the defendant had introduced no evidence of remorse or argument concerning it. *People v Lewis* (2001) 25 C4th 610, 673, 106 CR2d 629; see *People v Ochoa* (2001) 26 C4th 398, 449, 110 CR2d 324 (prosecutor may argue absence of defense evidence of remorse makes the potential mitigating factor inapplicable).

### 👉 JUDICIAL TIPS:

- An objection that the prosecutor's comment is an impermissible conclusion or violates defendant's privilege against self-incrimination should be overruled. *E.g.*, *People v Thornton* (2007) 41 C4th 391, 460, 61 CR3d 461 (prosecutor may argue that defendant seeking mercy should present evidence that he is

remorseful). The prosecution may not argue, however, that defendant's failure to take the stand shows lack of remorse. See *People v Boyette* (2002) 29 C4th 381, 453–454, 127 CR2d 544 (improper to argue that if defendant were to “take the stand and say he was sorry, which you didn’t see . . .”); *People v Ervin* (2000) 22 C4th 48, 103, 91 CR2d 623. An argument that defendant failed to express remorse does not impliedly refer to defendant's failure to testify. *People v Sakarias* (2000) 22 C4th 596, 645, 94 CR2d 17.

- Offering a defense (e.g., mistaken identity) does not show remorselessness. *People v Gonzalez* (1990) 51 C3d 1179, 1232, 275 CR 729. Nor does a claim of innocence. See *People v Harris* (2005) 37 C4th 310, 361, 33 CR3d 509.
- When there is no evidence on remorse one way or the other, some judges permit no argument on the subject; others preclude only the prosecution.
- Some judges also do not let the prosecutor argue lack of remorse when defendant has steadfastly denied guilt and either not testified or maintained his or her innocence throughout the testimony.

## 12. [§99.89] Lingering Doubt

Lingering doubt is a proper consideration for the jury and is frequently argued. See §99.61. In rebuttal, the prosecutor may properly remind the jury that little room remains for residual doubt (*People v Arias* (1996) 13 C4th 92, 183, 51 CR2d 770), that the jury is not to redetermine guilt, and that in the penalty phase, defendant's guilt is conclusively presumed (*People v DeSantis* (1992) 2 C4th 1198, 1238, 9 CR2d 628).

It is, however, improper to suggest that the jurors ignore lingering doubt (see *People v Medina* (1995) 11 C4th 694, 743, 47 CR2d 165) or to disparage the rule or instruction that allows the jury to take it into account (see *People v Arias*, *supra*).

## 13. [§99.90] Misleading Jury as to Sentencing Responsibility

It is impermissible to mislead the jury as to the nature of its ultimate duty at the penalty phase. *People v Edelbacher* (1989) 47 C3d 983, 1040, 254 CR 586. Undermining the jury's sense of responsibility for determining defendant's sentence violates the Eighth Amendment. *Caldwell v Mississippi* (1985) 472 US 320, 329, 105 S Ct 2633, 86 L Ed 2d 231. It is not *Caldwell* error to argue that the jurors' function is to render an opinion on the proper penalty, as long as the rest of the argument makes the jurors' sentencing responsibility clear. *People v Welch* (1999) 20 C4th 701, 762, 85 CR2d 203. An argument that the jury is not the executioner is “potentially misleading.” *People v Ervin* (2000)

22 C4th 48, 100, 91 CR2d 623 (argument not prejudicial in light of court’s standard sentencing instructions).

- JUDICIAL TIP: The court should not permit argument about appellate review, although brief reference to it may not be fatal. See *People v Mendoza* (2000) 24 C4th 130, 186, 99 CR2d 485.

**a. [§99.91] Illustrations of Reversible Error**

Reversible error includes:

- Argument suggesting that jurors’ responsibility is to merely weigh aggravating and mitigating factors, and that they then must return a death sentence if the former preponderate without reaching individual conclusions as to the appropriate sentence. *People v Edelbacher* (1989) 47 C3d 983, 254 CR 586 (death sentence reversed).
- Argument that whether defendant lives or dies was decided by the voters, and the jury decides only whether aggravation outweighs mitigation. *People v Farmer* (1989) 47 C3d 888, 928–929, 254 CR 508 (death sentence reversed).
- JUDICIAL TIP: Remarks that the voters overwhelmingly approved the death penalty are also improper, although by themselves, they do not violate *Caldwell v Mississippi* (1985) 472 US 320, 105 S Ct 2633, 86 L Ed 2d 231. *People v Rowland* (1992) 4 C4th 238, 276, 14 CR2d 377.
- Telling jurors that their decision is automatically reviewed. *Caldwell v Mississippi, supra* (death sentence reversed).
- Arguing that jurors do not have to shoulder the burden of personal responsibility. *People v Milner* (1988) 45 C3d 227, 257, 246 CR 713 (death sentence reversed).

**b. [§99.92] Illustrations of Permissible Argument**

Permissible argument includes:

- Quoting Kant’s statement that there is no justice until the last murderer on earth has been punished. *People v Stanley* (2006) 39 C4th 913, 960, 47 CR3d 420; *People v Schmeck* (2005) 37 C4th 240, 300, 33 CR3d 397.
- “You betray your community sense of justice if you are allowed to forgive. Only [the victim] is allowed to forgive. You have the responsibility that justice is done for [the victim].” *People v Stanley, supra*. Also permissible is: “You are not here to forgive.

That is for some other authority. You are here to impose punishment . . . .” *People v Avila* (2009) 46 C4th 680, 721, 94 CR3d 699.

- Telling the jury that defendants condemned themselves to death by their acts, as long as the prosecutor also makes clear that the jury’s decision is left to the discretion of individual jurors. *People v Jackson* (1996) 13 C4th 1164, 1239, 56 CR2d 49; see *People v Ledesma* (Ledesma II) (2006) 39 C4th 641, 741, 47 CR3d 326; *People v Cleveland* (2004) 32 C4th 704, 761, 11 CR3d 236.
- Comparing the jury’s role to that of a baseball umpire who must follow the rules of the game and referring to a chart listing the statutory factors. *People v Lucas* (1995) 12 C4th 415, 493–494, 48 CR2d 525 (permissible when prosecutor also acknowledges that jury’s function is not automatic or mechanical but normative).
- Arguing that the jurors should not feel guilty or personally responsible as long as the clear context is that moral blame for the consequences of the crime rests with the defendant, not with the jurors, and the prosecutor reminds the jurors of their individual sentencing responsibility and discretion. *People v Fierro* (1991) 1 C4th 173, 247, 3 CR2d 426.
- Arguing that the jury is the conscience of the community. *People v Gamache* (2010) 48 C4th 347, 388–389, 106 CR3d 771; *People v Lucero* (2000) 23 C4th 692, 733–734, 97 CR2d 871. Arguing in multiple murder case that defense position essentially is that the victims after the first one don’t count, that they “are freebies.” *People v Prince* (2007) 40 C4th 1179, 1295, 57 CR3d 543 (argument does not invite jury to count mechanically or to act on basis of passion; court noted prosecutor did not argue that death penalty should always be imposed in a multiple murder case).
- Arguing that the difficulty is not whether the death penalty is justified in the case, but “whether all 12 of you have the intestinal fortitude to impose” it. *People v Stevens* (2007) 41 C4th 182, 208, 59 CR3d 196.
- Arguing that the death penalty is collective vengeance, a vital expression of community outrage, and that a society incapable of imposing such punishment where warranted is decadent and emasculated. *People v Zambrano* (2007) 41 C4th 1082, 1177–1178, 63 CR3d 297 (permissible if comments are brief, isolated, and not the main basis for advocating death penalty).

➡ JUDICIAL TIPS: Guard against the “potentially inflammatory” effect of such argument. See *People v Zambrano*, *supra*. Do not

allow argument that the victim’s family is entitled to vengeance.  
See *People v Collins* (2010) 49 C4th 175, 229, 110 CR3d 384.

#### 14. [§99.93] Plea Bargains in Other Cases Against Defendant

The prosecutor may not comment adversely on the fact that defendant entered negotiated pleas in other cases. *People v Melton* (1988) 44 C3d 713, 755–756 n16, 244 CR 867.

#### 15. [§99.94] Postcrime Events

The prosecutor may not argue that the jury cannot consider matters that took place after the crime. *Brown v Payton* (2005) 544 US 133, 141–147, 125 S Ct 1432, 161 L Ed 2d 334.

☛ JUDICIAL TIP: Give a curative instruction if such an argument is made. See *Brown v Payton*, *supra*.

#### 16. [§99.95] Rebuttal Evidence

Rebuttal evidence only counters mitigating evidence; accordingly, the prosecution should not be permitted to argue that evidence offered in rebuttal is aggravating. *People v Edelbacher* (1989) 47 C3d 983, 1033, 254 CR 586.

#### 17. [§99.96] Sympathy

The jury is entitled to consider sympathy for the defendant, and both sides may argue it. *People v Edwards* (1991) 54 C3d 787, 840, 1 CR2d 696. Permissible prosecution argument includes:

- Show defendant the same mercy he showed the victim. *People v Zambrano* (2007) 41 C4th 1082, 1175, 63 CR3d 297; see *People v Rogers* (2009) 46 C4th 1136, 1181, 95 CR3d 652 (defendant gave no sympathy and deserves none).
- How much sympathy did defendant show the victims? *People v Kraft* (2000) 23 C4th 978, 1076–1077, 99 CR2d 1 (proper in response to defense argument for sympathy).
- Consider whether defendant deserves to live. *People v Arias* (1996) 13 C4th 92, 176–177, 51 CR2d 770.
- When thinking of sympathy for defendant, think of the victim and measure that against what may be called mitigation. *People v Jackson* (1996) 13 C4th 1164, 1241, 56 CR2d 49.
- There is no reason to feel sympathy. *People v Maury* (2003) 30 C4th 342, 420, 133 CR2d 561 (argument that defendant forfeited his right to sympathy); see *People v Avila* (2009) 46 C4th 680,

721, 94 CR3d 699 (argument that defendant has not earned jury's sympathy).

It is improper to suggest that the jury is not entitled to consider sympathy. *People v Jackson*, *supra*; *People v Edwards*, *supra*. It is, however, proper to argue that sympathy for the defendant's family is not a mitigating factor. *People v Dykes* (2009) 46 C4th 731, 792, 95 CR3d 78; *People v Ochoa* (1998) 19 C4th 353, 456, 79 CR2d 408 (jury may not consider sympathy for defendant's family); see *People v Romero* (2008) 44 C4th 386, 425, 79 CR3d 334.

Sympathy for the victims is also the proper subject for argument at the penalty phase (*People v Bradford* (1997) 15 C4th 1229, 1379, 65 CR2d 145 (prosecutor urged jurors to consider victims' suffering from their perspective)), though generally not at the guilt phase. *People v Leonard* (2007) 40 C4th 1370, 1406, 58 CR3d 368.

## 18. [§99.97] Victim Impact

Victim impact argument is not limited to testimony. The prosecutor may urge the jury to draw reasonable inferences regarding the probable impact of the crime on the victim and his or her family. *People v Kirkpatrick* (1994) 7 C4th 988, 1017, 30 CR2d 818.

For example, the prosecutor may properly urge the jury to assess the offense from the victim's viewpoint as long as the remarks are not calculated to arouse passion or prejudice. *People v Slaughter* (2002) 27 C4th 1187, 1212, 120 CR2d 477; *People v Bradford* (1997) 15 C4th 1229, 1379, 65 CR2d 145; see also §99.96. The prosecutor may ordinarily ask the jury to consider the pain suffered by the victim. *People v Dykes* (2009) 46 C4th 731, 793–794, 95 CR3d 78.

Telling the jurors they are victims because they have to make a decision whether somebody lives or dies is misconduct; arguing that when a child dies we have all been made victims is not. *People v Mendoza* (2007) 42 C4th 686, 706, 68 CR3d 274. The prosecutor may also ask the jurors how they would feel if someone they loved died in the gutter like the victim. *People v Jackson* (2009) 45 C4th 662, 690–692, 88 CR3d 558 (noting that comments were brief and that court does not encourage prosecutors to use such graphic images).

Telling the jury that surviving husband was a murder victim as much as the actual victim is permissible. *People v Hamilton* (2009) 45 C4th 863, 928, 89 CR3d 286 (court noted that prosecutor limited such comment to single statement).

- ☛ JUDICIAL TIP: As in other phases of argument, be aware of nuances to keep it from becoming unduly emotional.

## F. Instructions

### 1. Guilt Phase Instructions

#### a. [§99.98] Applicability

In addition to instructions unique to the penalty phase (CALCRIM 760–766; CALJIC 8.84–8.88), many, but not all, of the general instructions given in the guilt phase apply in the penalty phase.

The most important guilt phase instruction that does *not* apply is the no-sympathy instruction of CALCRIM 200 and CALJIC 1.00. Giving this instruction invites reversal. *People v Easley* (1983) 34 C3d 858, 875–880, 196 CR 309; see *People v Seaton* (2001) 26 C4th 598, 684, 110 CR2d 441 (instruction that jurors must not be influenced by pity for defendant erroneous but not prejudicial when court also told jurors they may consider sympathy). See also §99.96, 99.114.

Also inapplicable is the instruction that tells the jury to disregard the consequences of its verdict (CALCRIM 200: “reach your verdict without any consideration of punishment”; CALJIC 1.00: “reach a just verdict regardless of the consequences”). See §99.119; for other instructions that should not be given in the penalty phase, see §99.129.

☛ JUDICIAL TIP: Many judges provide the jury with written instructions in both phases of the trial, as suggested (but not mandated) in *People v Seaton*, *supra*, 26 C4th at 673.

#### b. [§99.99] Proper Method of Dealing With Guilt Phase Instructions

The trial court should expressly inform the jury at the penalty phase which of the guilt phase instructions continue to apply. *People v Romero* (2008) 44 C4th 386, 424, 79 CR3d 334; *People v Weaver* (2001) 26 C4th 876, 982, 111 CR2d 2. But see *People v Butler* (2009) 46 C4th 847, 873, 95 CR3d 376 (court not required to specify applicable guilt phase instructions).

☛ JUDICIAL TIPS:

- This is best done by giving CALCRIM 761 or CALJIC 8.84.1 (jury to disregard all other instructions given in other phases of trial) and rereading applicable guilt phase instructions, usually CALCRIM 222, 223, 226, 300, 301, 302, 333 or CALJIC 1.01, 1.02, 1.03, 2.00, 2.11, 2.20, 2.21.1, 2.22, 2.27, 2.81, 2.90, and others that apply to the particular case (e.g., CALCRIM 303, 332, 334, 335 or CALJIC 2.09, 2.80, 3.11, 3.12). See *People v Cowan* (2010) 50 C4th 401, 494, 113 CR3d 850 (error not to redefine reasonable doubt); *People v Harris* (2008) 43 C4th 1269,

1318–1320, 78 CR3d 295; *People v Moon* (2005) 37 C4th 1, 36–37, 32 CR3d 894.

- Instructing the jury instead to consider all previous instructions it finds to be applicable is potentially misleading and should be avoided.

## 2. Factor (a)

### a. [§99.100] Consideration of Guilt Phase Evidence

CALCRIM 761 and CALJIC 8.85 properly instruct the jury to consider all the evidence received during any part of the trial. *People v Champion* (1995) 9 C4th 879, 946–947, 39 CR2d 547 (dealing with CALJIC 8.85). On request, the court may instruct that the jury should consider guilt phase evidence only for the light it sheds on defendant’s guilt and not as evidence of bad character. See *People v Champion, supra*, 9 C4th at 947. *Champion* does not state whether the court should give such an instruction on request, although many judges do so. Others believe such an instruction is unnecessary and may be misleading in cases in which character is in issue.

On request, the instruction sometimes needs to be limited by directing the jury to disregard evidence that is inadmissible during the penalty phase. See *People v Barnett* (1998) 17 C4th 1044, 1168, 74 CR2d 121 (evidence of nonviolent escape attempt; see §99.27).

- ☛ JUDICIAL TIP: A limiting instruction should not be given sua sponte: defendant may feel that it calls undue attention to the particular evidence. See also *People v Quartermain* (1997) 16 C4th 600, 630, 66 CR2d 609 (court not required to give limiting instruction unless requested).

The court need not instruct that the first degree murder conviction or the finding of special circumstances are not themselves aggravating circumstances. *People v Farley* (2009) 46 C4th 1053, 1131, 96 CR3d 191.

### b. [§99.101] Overlap With Factor (b)

Factors (a) and (b) are mutually exclusive, and the instructions should make that clear. *People v Miranda* (1987) 44 C3d 57, 105–106, 241 CR 594. CALCRIM 764 and CALJIC 8.87 achieve that purpose. See *People v Bonin* (1988) 46 C3d 659, 703–704, 250 CR 687, overruled on other grounds in 17 C4th 800, 823 n1.

An additional instruction that factor (b) refers to crimes of violence other than those of which defendant was convicted in the guilt phase need not be given, absent improper argument by the prosecution (*People v Hardy* (1992) 2 C4th 86, 205, 5 CR2d 796) and is usually not given.

### c. [§99.102] Overlap With Factor (c)

Factors (a) and (c) are also mutually exclusive (except as discussed in §99.51). The instructions should make this clear by limiting the jury's consideration under factor (c) to *prior* felony convictions. See *People v Mayfield* (1997) 14 C4th 668, 804–805, 60 CR2d 1; *People v Webster* (1991) 54 C3d 411, 453, 285 CR 31; CALCRIM 765; CALJIC 8.86. Most judges do not give an additional instruction unless the prior conviction was for first or second degree murder. See §99.51.

## 3. Factors (b) and (c)

### a. [§99.103] Overlap

Factors (b) and (c) may and often do overlap. See §§99.38, 99.51. Judges usually do not supplement CALCRIM 764 and 765 and CALJIC 8.86 and 8.87 on this point. See *People v Barnett* (1998) 17 C4th 1044, 1180, 74 CR2d 121. An instruction whose import is that the two factors cannot overlap is erroneous. *People v Webster* (1991) 54 C3d 411, 453, 285 CR 31.

### b. [§99.104] Reasonable Doubt

It is obligatory to instruct sua sponte that factors (b) and (c) have to be proved beyond a reasonable doubt. *People v Anderson* (2001) 25 C4th 543, 584, 106 CR2d 575; *People v Thompson* (1988) 45 C3d 86, 127, 246 CR 245; *People v Robertson* (1982) 33 C3d 21, 53–55, 188 CR 77; CALCRIM 764, 765; CALJIC 8.86, 8.87. However, the court need not instruct on the presumption of innocence or the burden of proof. *People v Prieto* (2003) 30 C4th 226, 262, 133 CR2d 18; *People v Benson* (1990) 52 C3d 754, 809, 276 CR 827. Such instructions are usually not given at the penalty phase. See §§99.129–99.130. Nor need the court supplement CALJIC 8.87 with an instruction that the jury could only consider an unadjudicated act as aggravating if it found beyond a reasonable doubt that the act involved the use, attempted use, or threat of violence. *People v Ochoa* (2001) 26 C4th 398, 453, 110 CR2d 324. The same is probably true of CALCRIM 764.

☛ JUDICIAL TIP: Define reasonable doubt again for the jury. See *People v Chatman* (2006) 38 C4th 344, 408, 42 CR3d 621.

### c. [§99.105] Elements of Crime

On defense request, the court must instruct on the elements of factor (b) or (c) crimes. *People v Adcox* (1988) 47 C3d 207, 256, 253 CR 55; see *People v Melton* (1988) 44 C3d 713, 755, 244 CR 867. The court may also

so instruct at the request of the prosecution. *People v Michaels* (2002) 28 C4th 486, 539, 122 CR2d 285.

- JUDICIAL TIP: Elements should *not* be defined sua sponte because defendant may not want such emphasis on his or her crimes. *People v Hart* (1999) 20 C4th 546, 651, 85 CR2d 132; *People v Avena* (1996) 13 C4th 394, 435, 53 CR2d 301.

#### d. [§99.106] Enumeration of Crimes

The court should enumerate for the jury the particular crimes it may consider under factor (b). See *People v Ramirez* (1990) 50 C3d 1158, 1185, 270 CR 286; *People v Robertson* (1982) 33 C3d 21, 55 n19, 188 CR 77; CALCRIM 764; CALJIC 8.87. The court may properly tell the jury that each of the listed crimes involved the express or implied use of force or violence or the threat of force or violence. *People v Loker* (2008) 44 C4th 691, 745, 80 CR3d 630; see §99.32.

- JUDICIAL TIP: Make sure that nothing you say suggests that the defendant committed a violent crime. Telling the jury the specific crimes it may consider under factor (b) is especially important when the prosecution has adduced evidence of criminal activity not to prove factor (b), but as part of the circumstances of a factor (b) crime. See, e.g., *People v Ramirez, supra* (evidence of sexual molestation admitted in course of proving prior crime). It is also important when evidence of other crimes was offered for impeachment or rebuttal.

### 4. Other Instructions Concerning Factors

#### a. [§99.107] Inapplicable Factors

The instructions need not delete inapplicable factors; it suffices to instruct, as in CALCRIM 763 and CALJIC 8.85, that the jury is to be guided by the factors that apply. *People v Kipp* (2001) 26 C4th 1100, 1138, 113 CR2d 27; *People v Williams* (1997) 16 C4th 153, 268, 66 CR2d 123. See *People v Rogers* (2006) 39 C4th 826, 902, 48 CR3d 1 (court may delete factors not supported by substantial evidence). The prevailing practice is not to delete.

#### b. [§99.108] Absence of Mitigating or Aggravating Evidence

The court need not instruct that a lack of mitigating evidence is not aggravation. *People v Carey* (2007) 41 C4th 109, 133, 59 CR3d 172; *People v Hinton* (2006) 37 C4th 839, 912, 38 CR3d 139 (nothing in prosecution's argument suggested otherwise).

- ☛ JUDICIAL TIP: Many judges so instruct on request to guard against the danger that the jury will regard absence of a mitigating factor as aggravating. The instruction should be given especially when there was a contrary suggestion during the trial. *People v Carey*, *supra*; *People v Coddington* (2000) 23 C4th 529, 639, 97 CR2d 528, overruled on other grounds in 25 C4th 1046, 1069 n13; *People v Livaditis* (1992) 2 C4th 759, 784, 9 CR2d 72.

As to the converse situation, the court need not instruct that lack of evidence of a particular aggravating factor is a “significant mitigating circumstance.” *People v Jones* (1998) 17 C4th 279, 314, 70 CR2d 793 (“significant” is inaccurate; significance is a jury matter); see *People v Lucero* (2000) 23 C4th 692, 725, 97 CR2d 871 (court need not instruct that lack of history of violence is mitigating).

### c. [§99.109] Definitions of “Aggravating” and “Mitigating”

The court need not define “aggravating” and “mitigating” because those “are commonly understood terms.” *People v Williams* (1997) 16 C4th 153, 267, 66 CR2d 123. However, CALCRIM 763 and CALJIC 8.88 include definitions, and these are generally given. See *People v Taylor* (2001) 26 C4th 1155, 1180, 113 CR2d 827 (definition in CALJIC 8.88 sufficient despite studies indicating jurors may misunderstand instruction). An instruction that mitigating factors are “unlimited” is proper, but not mandatory. *People v Smithey* (1999) 20 C4th 936, 1007, 86 CR2d 243.

### d. [§99.110] Differentiating Mitigating and Aggravating Factors

Instructions need not and customarily do not specify which factors are aggravating and which mitigating. *People v Davenport* (Davenport II) (1995) 11 C4th 1171, 1229, 47 CR2d 800; *People v Fudge* (1994) 7 C4th 1075, 1126, 31 CR2d 321. Nor need the jury be told that factors (d) through (h) can only be considered in mitigation. *People v Coddington* (2000) 23 C4th 529, 638, 97 CR2d 528, overruled on other grounds in 25 C4th 1046, 1069 n13; *People v Musselwhite* (1998) 17 C4th 1216, 1268, 74 CR2d 212. See *Buchanan v Angelone* (1998) 522 US 269, 275–279, 118 S Ct 757, 139 L Ed 2d 702 (no constitutional requirement to instruct on mitigation as long as jury not precluded from giving effect to mitigating evidence).

The court should not instruct that the jury may consider the statutory factors as either aggravating or mitigating. See *People v Williams* (1997) 16 C4th 153, 271–273, 66 CR2d 123. The court may, but need not, instruct that chronological age is not by itself an aggravating or mitigating factor. *People v Ayala* (2000) 23 C4th 225, 302, 96 CR2d 682. The court need not instruct that the defendant’s age could only be considered as

mitigating when he had turned 18 one month before committing the murders. *People v Booker* (2011) 51 C4th 141, 194, 119 CR3d 722.

**e. [§99.111] Nonstatutory Aggravating Factors**

Instructions need not direct jurors not to consider nonstatutory aggravating factors. *People v Avila* (2009) 46 C4th 680, 723, 94 CR3d, 699; *People v Ramirez* (2006) 39 C4th 398, 471, 46 CR3d 677. However, such an instruction accurately reflects the legal rule (*People v Williams* (1988) 45 C3d 1268, 1324, 248 CR 834), and the court should give it on request. *People v Hillhouse* (2002) 27 C4th 469, 509 n6, 117 CR2d 45. But see *People v Davis* (2009) 46 C4th 539, 622–623, 94 CR3d 322 (proposed instruction properly rejected as duplicating standard instruction).

- JUDICIAL TIP: In light of the broad definition of an aggravating factor in [CALCRIM 763](#) and [CALJIC 8.88](#) (“any fact, condition, or event relating to the commission of a crime . . . that increases the wrongfulness of the defendant’s conduct, the enormity of the offense, or the harmful impact of the crime”), such an instruction may disabuse jurors of any notion that they may consider nonstatutory aggravating factors. See [CALCRIM 763](#), bracketed paragraph after list of factors. Argument will often make this point clear.

**f. [§99.112] Extreme Mental or Emotional Disturbance: Clarifying Instruction**

It is permissible to instruct in the statutory language, without amplification, that “*extreme* mental or emotional disturbance” is a factor for the jury to consider ([Pen C §190.3\(d\)](#); italics added). See, e.g., *People v Ramos* (2004) 34 C4th 494, 530, 21 CR3d 575; *People v Roybal* (1998) 19 C4th 481, 523, 79 CR2d 487. However, under factor (k), the jury also considers nonextreme disturbances. See [§99.53](#). To avoid misunderstanding on this point, some judges instruct on request along the following lines:

One of the factors listed in the instruction on penalty factors is whether the defendant “was under the influence of extreme mental or emotional disturbance” when he or she committed the crimes of which he or she was convicted in the guilt phase. However, you must consider any evidence that defendant was under the influence of any kind of mental or emotional disturbance, whether “extreme” or not, when he or she committed the crimes, for whatever mitigating force you conclude it has, if you find the evidence credible.

Analogous instructional problems occasionally arise under other factors, such as factors (f) (reasonable belief in justification) and (g) (extreme duress).

The court need not strike the word “extreme” from factors (d) and (g). *People v Sanchez* (1995) 12 C4th 1, 80, 47 CR2d 843. Nor need the court define “extreme.” *People v Weaver* (2001) 26 C4th 876, 992, 111 CR2d 2. Some judges believe that striking “extreme” is a simple and practical alternative to giving a clarifying instruction, but most neither strike nor give a clarifying instruction. Nor need the court define “mental or emotional disturbance.” *People v Rogers* (2006) 39 C4th 826, 899, 48 CR3d 1.

An instruction that factor (d) can only be mitigating is unnecessary as long as the prosecutor’s argument or other instructions do not suggest that mental illness could be an aggravating factor. *People v Jones* (2003) 30 C4th 1084, 1124, 135 CR2d 370.

## 5. [§99.113] Burden of Proof; Weighing Process

Except for reasonable doubt as to factors (b) and (c) (see §99.104), instructions on the burden of proof are unnecessary and should not be given. *People v Mendoza* (2000) 24 C4th 130, 191, 99 CR2d 485; *People v Carpenter* (1997) 15 C4th 312, 417–418, 63 CR2d 1; see §99.10.

The jury need not be and customarily is not given a standard for resolving factual disputes. *People v Holt* (1997) 15 C4th 619, 682–684, 63 CR2d 782; see *People v Thornton* (2007) 41 C4th 391, 467, 61 CR3d 461. To instruct on the process of weighing mitigating and aggravating circumstances, judges usually give CALCRIM 766 or CALJIC 8.88, which is sufficient. See *People v Smith* (2005) 35 C4th 334, 369, 25 CR3d 554; *People v Box* (2000) 23 C4th 1153, 1216, 99 CR2d 69 (dealing with CALJIC 8.88). The court need not instruct that the prosecution has the burden of persuasion or that the jury may impose the death penalty only if it finds beyond a reasonable doubt that death is the appropriate penalty. *People v Steele* (2002) 27 C4th 1230, 1259, 120 CR2d 432. Similarly, the court should not instruct the jurors to fix the penalty at LWOP if they have a doubt as to which penalty is appropriate. *People v Lee* (2011) 51 C4th 620, 655, 122 CR3d 117. Nor need the court instruct that the jury may return an LWOP verdict even if it finds that the aggravating factors outweigh the mitigating ones. *People v Lenart* (2004) 32 C4th 1107, 1135, 12 CR3d 592.

### 👉 JUDICIAL TIPS:

- Requests for additional instructions are often made and usually denied. See §§99.129–99.130.

- Instructions should avoid the language of [Pen C §190.3](#) that the jury “shall” impose a sentence of death if it concludes that aggravating circumstances outweigh mitigating ones. *People v Brasure* (2008) 42 C4th 1037, 1060, 71 CR3d 675 (jury must also be told that to return verdict of death, each juror must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death sentence is warranted); *People v Cooper* (1991) 53 C3d 771, 844–845, 281 CR 90 (risks jury misunderstanding unless supplemented by instruction that jury not to determine penalty by counting factors but by assigning weight to each factor and that a single factor can outweigh all the others).

## 6. [§99.114] Sympathy

The court need not instruct that the jury may consider sympathy for the defendant in the penalty phase. *People v Marshall* (1996) 13 C4th 799, 859, 55 CR2d 347. In addition, there is no sua sponte duty to countermand the no-sympathy instruction given at the guilt phase. *People v Frye* (1998) 18 C4th 894, 1024, 77 CR2d 25; *People v Avena* (1996) 13 C4th 394, 436, 53 CR2d 301; see also §99.98.

- ➡ JUDICIAL TIP: Many judges instruct briefly that the jury may consider pity or sympathy for the defendant in determining the penalty. See, e.g., *People v Loker* (2008) 44 C4th 691, 744, 80 CR3d 630; *People v Hines* (1997) 15 C4th 997, 1069, 64 CR2d 594; *People v Cox* (1991) 53 C3d 618, 672–673, 280 CR 692. For form of instruction, see [CALCRIM 763](#); [CALJIC 8.85](#) (bracketed material in par. k); *People v Benavides* (2005) 35 C4th 69, 109 n9, 24 CR3d 507; *People v Carter* (2003) 30 C4th 1166, 1226 n23, 135 CR2d 553; *People v Ochoa* (1998) 19 C4th 353, 458, 79 CR2d 408. Some judges who do not reread guilt phase instructions explicitly countermand the no-sympathy instruction.

Jurors need not be told that they have the power to exercise mercy (*People v Lewis* (2001) 26 C4th 334, 393, 110 CR2d 272; *People v Caro* (1988) 46 C3d 1035, 1067, 251 CR 757), as long as other instructions, such as [CALJIC 8.85](#) and [CALJIC 8.88](#), convey to the jury that it may consider mercy. *People v Whisenhunt* (2008) 44 C4th 174, 226, 79 CR3d 125.

The court may instruct the jurors not to place themselves in the shoes of the victim or of the defendant. *People v Roybal* (1998) 19 C4th 481, 530, 79 CR2d 487.

## 7. [§99.115] Lingering Doubt

It is not mandatory to instruct on lingering doubt as long as the instructions define factor (k) as broadly as CALJIC 8.85. *People v Rogers* (2009) 46 C4th 1136, 1176, 95 CR3d 652 (concept sufficiently covered by CALJIC 8.85); *People v Panah* (2005) 35 C4th 395, 497, 25 CR3d 672; see *People v Page* (2008) 44 C4th 1, 55, 79 CR3d 4.

Some judges instruct on this subject on request because lingering doubt is nearly always argued and a brief explanation clarifies the matter for the jury. See, e.g., *People v Arias* (1996) 13 C4th 92, 182, 51 CR2d 770; *People v Cox* (1991) 53 C3d 618, 678 n20, 280 CR 692. The following instruction was given in *Arias*:

It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

The court may supplement such an instruction by telling the jury that it may not relitigate or reconsider matters resolved in the guilt phase. *People v Harrison* (2005) 35 C4th 208, 255, 25 CR3d 224.

The court's refusal to give a lingering doubt instruction does not preclude counsel from arguing the matter. *People v Ward* (2005) 36 C4th 186, 220, 30 CR3d 464; see §99.89.

Other judges decline to instruct on the topic, but inform an inquiring jury that it may consider lingering doubt.

## 8. Effects of Verdict

### a. [§99.116] Jury Speculation About Commutation of Sentence

Jurors are often concerned whether a defendant serving an LWOP sentence will actually spend his whole life in prison in light of the governor's commutation power. Upon defense request, the court should give an instruction designed to forestall jury speculation about such future events; the court need not give such an instruction on its own motion. *People v Letner & Tobin* (2010) 50 C4th 99, 203–206, 112 CR3d 746 (hereafter *Letner*).

Letner suggests the following instruction (50 C4th at 206):

It is your responsibility to decide which penalty is appropriate in this case. You must base your decision upon the evidence you have heard in court, informed by the instructions I have given you. You must not be influenced by speculation or by any considerations other than those upon which I have instructed you.

Letner disapproved instructing the jury to assume that whatever sentence it chooses will be carried out. 50 C4th at 206. For such an instruction, see, e.g., *People v Wallace* (2008) 44 C4th 1032, 1090–1091, 81 CR3d 651; *People v Fierro* (1991) 1 C4th 173, 250, 3 CR2d 426; CALCRIM 767.

**b. [§99.117] Parole Ineligibility**

When the prosecution puts defendant's future dangerousness in issue, the court should instruct on request that defendant is ineligible for parole. *Shafer v South Carolina* (2001) 532 US 36, 48–51, 121 S Ct 1263, 149 L Ed 2d 178; *Simmons v South Carolina* (1994) 512 US 154, 162, 114 S Ct 2187, 129 L Ed 2d 133; see *People v Lucas* (1995) 12 C4th 415, 497, 48 CR2d 525. Permitting defendant to argue parole ineligibility is a permissible alternative to this instruction. See *Ramdass v Angelone* (2000) 530 US 156, 165, 120 S Ct 2113, 147 L Ed 2d 125 (plurality opinion; due process entitles defendant to inform jury of parole ineligibility “either by a jury instruction or in arguments by counsel”).

An instruction or argument that life imprisonment means until defendant's death is not sufficient; it does not adequately convey that a life sentence would permit no parole or early release. *Shafer v South Carolina*, *supra*, 532 US at 52–53. Nor is it sufficient to instruct that parole ineligibility is not a proper issue for the jury's consideration. *Simmons v South Carolina*, *supra*.

No parole ineligibility instruction is necessary when future dangerousness is not in issue at least as long as defense counsel can argue that an LWOP sentence means defendant will always be imprisoned. *People v Boyer* (2006) 38 C4th 412, 487, 42 CR3d 677; *People v Musselwhite* (1998) 17 C4th 1216, 1271, 74 CR2d 212. Future dangerousness is in issue when the prosecution has introduced evidence that tends to prove it, even when the prosecution does not argue it. *Kelly v South Carolina* (2002) 534 US 246, 254–255, 122 S Ct 726, 151 L Ed 2d 670.

**c. [§99.118] Deterrent Effect of Death Penalty**

It is unnecessary to admonish the jury not to weigh the deterrent or nondeterrent effects of the death penalty, unless the issue was raised during the trial. *People v Davis* (2009) 46 C4th 539, 621, 94 CR3d 322; *People v San Nicolas* (2004) 34 C4th 614, 671, 21 CR3d 612. This is also true as to the cost of executing or imprisoning defendant. *People v Bacigalupo* (1991) 1 C4th 103, 146, 2 CR2d 335.

The judge, however, may properly give such an instruction to forestall consideration of deterrence or cost. *People v Welch* (1999) 20 C4th 701, 765–766, 85 CR2d 203 (may be appropriate in some cases);

*People v Thompson* (1988) 45 C3d 86, 132, 246 CR 245. For a form of instruction, see [CALJIC 8.85.2](#).

**d. [§99.119] Consequences of Verdict**

The penalty phase jury should *not* be instructed to disregard the consequences of its verdict. *People v Ray* (1996) 13 C4th 313, 353–354, 52 CR2d 296 (instruction to “reach a just verdict regardless of the consequences” impermissible at penalty phase); *People v Mayfield* (1993) 5 C4th 142, 183, 19 CR2d 836.

☛ JUDICIAL TIP: On request, some judges admonish the penalty phase jury to disregard the guilt phase instruction on this subject. It is not clear whether there is a duty to do so. See *People v Kipp* (1998) 18 C4th 349, 379–380, 75 CR2d 716.

**9. Other Instructions That Should Be Given When Applicable**

**a. [§99.120] Accomplice and Codefendant Testimony**

Whenever an accomplice or codefendant testifies, the court must instruct sua sponte that the jury should view with caution any testimony by such a witness that tends to incriminate the defendant. *People v Box* (2000) 23 C4th 1153, 1209, 99 CR2d 69 (codefendant); *People v Guiuan* (1998) 18 C4th 558, 569, 76 CR2d 239 (accomplice or witness whom jury might determine to be one); see [CALJIC 3.18](#). This instruction should be given whether the witness is called by the prosecution or the defense. *People v Guiuan, supra*.

In addition, when the prosecution seeks to prove a factor (b) crime through an accomplice, the judge should instruct the jury that accomplice testimony must be corroborated. *People v Mincey* (1992) 2 C4th 408, 461, 6 CR2d 822.

Guilt phase instructions on this subject need not be repeated unless the judge has told the jury to disregard earlier instructions. *People v Hamilton* (1989) 48 C3d 1142, 1180, 259 CR 701.

**b. [§99.121] Admissions**

At the penalty phase, the judge should give a cautionary instruction ([CALJIC 2.70–2.71.7](#)) *only on request*, in contrast to the obligation to do so sua sponte at the guilt phase. *People v Livaditis* (1992) 2 C4th 759, 784, 9 CR2d 72. The defendant may not want such an instruction when, for example, defendant testified that he or she feels sorry about killing the victim. *People v Livaditis, supra*.

**c. [§99.122] Conspiracy**

The court must define conspiracy sua sponte when it is at issue in the penalty phase. *People v Williams* (1988) 45 C3d 1268, 1321, 248 CR 834.

**d. [§99.123] Defendant Not Testifying**

The court should give CALJIC 2.60 (no inference from fact that defendant does not testify), but only on defense request. *People v Holt* (1997) 15 C4th 619, 687, 63 CR2d 782.

**e. [§99.124] Defendant’s Absence During Penalty Phase**

On request, the court should admonish the jury to disregard defendant’s absence in the penalty determination. *People v Sully* (1991) 53 C3d 1195, 1241, 283 CR 144.

**f. [§99.125] Impeachment of Character Witness**

The court should give CALJIC 2.42 on request; there is no duty to give it sua sponte. *People v Daniels* (1991) 52 C3d 815, 883–884, 277 CR 122.

**g. [§99.126] Nonviolent Criminal Activity**

Judges usually instruct on defense request that the jury may not consider evidence of defendant’s nonviolent criminal activity that was received at the guilt phase. See §99.27.

➡ JUDICIAL TIP: This instruction need not be given sua sponte (*People v McLain* (1988) 46 C3d 97, 113, 249 CR 630) and should probably be given only on request, because defendant may not wish to call the jurors’ attention to the matter.

**h. [§99.127] Pinpointing Defense Theory**

In appropriate circumstances, the court should give a requested instruction that pinpoints a defense theory, but not if it is argumentative, duplicates other instructions, or is not supported by substantial evidence. *People v Bolden* (2002) 29 C4th 515, 558, 127 CR2d 802; see *People v Harrison* (2005) 35 C4th 208, 253, 25 CR3d 224; *People v Rincon-Pineda* (1975) 14 C3d 864, 885, 123 CR 119.

**i. [§99.128] Visible Restraints**

The court should instruct sua sponte that visible restraints have no bearing on defendant’s guilt or on the appropriate penalty. See *People v Sully* (1991) 53 C3d 1195, 1241, 283 CR 144; *People v Duran* (1976) 16 C3d 282, 291–292, 127 CR 618.

✎ JUDICIAL TIP: Give a similar instruction on request about stationing an armed deputy sheriff next to a testifying defendant. See *People v Hernandez* (2011) 51 C4th 733, 742–743, 121 CR3d 103; *People v Stevens* (2009) 47 C4th 625, 642, 101 CR3d 14.

## 10. [§99.129] Instructions That Should Not Be Given

The court should not instruct the penalty phase jury that:

- Defendant’s attempt to suppress evidence may show consciousness of guilt. *People v Rowland* (1992) 4 C4th 238, 281–282, 14 CR2d 377 (guilt not an issue at penalty phase).

✎ JUDICIAL TIP: Some judges consider consciousness of guilt relevant to lingering doubt.

- The jury must agree unanimously on the same aggravating factors (*People v Gutierrez* (2009) 45 C4th 789, 829, 89 CR3d 225; *People v Caro* (1988) 46 C3d 1035, 1057, 251 CR 757) or that at least one aggravating factor is present (*People v Mayfield* (1997) 14 C4th 668, 806, 60 CR2d 1). See also §§99.45, 99.104, 99.113.
- The jury may consider defendant’s character, background, history, etc., without limiting such consideration to mitigation. *People v Avena* (1996) 13 C4th 394, 438–439, 53 CR2d 301.
- The jury may not consider sympathy for the defendant. See §§99.96, 99.98.
- The jury must reach a just verdict regardless of the consequences. See §99.119.
- The jury must impose a death sentence if it concludes that aggravating circumstances outweigh mitigating ones. See §99.113.
- A reasonable doubt as to the proper penalty should be resolved in favor of LWOP. *People v Ledesma* (Ledesma II) (2006) 39 C4th 641, 739, 47 CR3d 326; *People v Hines* (1997) 15 C4th 997, 1069, 64 CR2d 594.
- As to factors other than (b) and (c), the standard of proof is preponderance of the evidence. *People v Carpenter* (1997) 15 C4th 312, 417–418, 63 CR2d 1.
- The prosecution must prove the existence of aggravating factors and that they outweigh mitigating factors beyond a reasonable doubt. *People v Griffin* (2004) 33 C4th 536, 595, 15 CR3d 743; *People v Prieto* (2003) 30 C4th 226, 262, 133 CR2d 18; see §99.113.

- The verdict of guilty and the finding of special circumstances are not aggravating factors. *People v Lenart* (2004) 32 C4th 1107, 1132, 12 CR3d 592.
- The jury should presume the appropriate sentence is life in prison. *People v Abilez* (2007) 41 C4th 472, 532, 61 CR3d 526.

#### 11. [§99.130] Other Instructions That Need Not Be Given

Judges may properly deny requests to instruct that:

- The jury must find that a mitigating circumstance exists if there is any substantial evidence to support it. *People v Hines* (1997) 15 C4th 997, 1068, 64 CR2d 594.
- The jury need not reach a unanimous conclusion with respect to mitigating factors. *People v Lewis* (2009) 46 C4th 1255, 1317, 96 CR3d 512 (even if the court gave such an instruction with respect to unadjudicated criminal activity).
- A mitigating circumstance need not be proved beyond a reasonable doubt. *People v Kraft* (2000) 23 C4th 978, 1077, 99 CR2d 1.
- A single mitigating circumstance may outweigh all the aggravating ones; a single mitigating factor may support a decision that death is not the appropriate penalty. *People v Redd* (2010) 48 C4th 691, 754, 108 CR3d 192; *People v Bolin* (1998) 18 C4th 297, 343, 75 CR2d 412. See *People v Cook* (2007) 40 C4th 1334, 1364, 58 CR3d 340 (instruction that one mitigating factor alone could justify LWOP sentence is covered by standard instructions).
- The jury may return an LWOP verdict even if it finds no mitigating circumstances or that such circumstances do not outweigh aggravating ones. *People v Seaton* (2001) 26 C4th 598, 688, 110 CR2d 441; see *People v Murtishaw* (2011) 51 C4th 574, 585–589, 121 CR3d 586.
- A life sentence is mandatory if the jury does not find that the aggravating circumstances outweigh those in mitigation. *People v Bolin, supra*, 18 C4th at 344 (proposed instruction is duplicative). Similarly, the jury need not be told explicitly that it must return an LWOP verdict if the mitigating circumstances outweigh the aggravating ones. *People v Carrington* (2009) 47 C4th 145, 199, 97 CR3d 117. For the converse instruction (death sentence is mandatory if aggravating factors outweigh mitigating ones), see §§99.113, 99.129.
- The jury may consider a detailed list of mitigating evidence. *People v Noguera* (1992) 4 C4th 599, 647–648, 15 C2d 400; *People v Benson* (1990) 52 C3d 754, 804, 276 CR 827.

- Death is a greater punishment than LWOP. *People v Williams* (1988) 45 C3d 1268, 1323, 248 CR 834.
- The jury make written findings or prepare a statement of reasons for the verdict. *People v Sanchez* (1995) 12 C4th 1, 80, 47 CR2d 843; *People v Pride* (1992) 3 C4th 195, 268, 10 CR2d 636. See *People v Millwee* (1998) 18 C4th 96, 166, 74 CR2d 418 (jury findings not needed for proper decision of automatic motion to modify).
- The jury should consider the sentences received by defendant's accomplices or codefendants. *People v Ochoa* (2001) 26 C4th 398, 456, 110 CR2d 324; see §99.63.
- Absence of premeditation and deliberation is a circumstance in mitigation. *People v Smith* (2003) 30 C4th 581, 638, 134 CR2d 1.
- The law has no preference as to penalty; the penalty decision is the sole province of the jury. *People v Watson* (2008) 43 C4th 652, 699, 76 CR3d 208 (instruction permissible but not required).
- The jury cannot sentence defendant to death solely on the facts that caused it to find him guilty of first degree murder. *People v Whisenhunt* (2008) 44 C4th 174, 226, 79 CR3d 125.
- The jury cannot use the first degree murder conviction or the special circumstance(s) as an aggravating circumstance. *People v Whisenhunt, supra*, 44 C4th at 226–227.
- The jury should not double count two special circumstances arising from a single incident. *People v Redd* (2010) 48 C4th 691, 754, 108 CR3d 192.

Most judges deny the above requests.

### III. POSTTRIAL MATTERS

#### A. Automatic Motion To Modify Death Verdict (Pen C §190.4(e))

##### 1. [§99.131] Statutory Requirements

Penal Code §190.4(e) provides that when the verdict is death, the defendant shall be deemed to have applied for modification of the verdict. The trial judge has five obligations under Pen C §190.4(e) (see *People v Alvarez* (1996) 14 C4th 155, 244, 58 CR2d 385):

- (1) To “review the evidence,”
- (2) To “consider . . . the aggravating and mitigating circumstances,”
- (3) To determine whether the jury’s decision “that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented,”
- (4) To “state on the record the reasons for his findings,” and

(5) To “direct that they be entered on the Clerk’s minutes.”

## 2. Deciding the Motion

### a. [§99.132] Function and Method

The function of the trial judge in deciding the motion is to determine whether the weight of the evidence supports the verdict. See, e.g., *People v Osband* (1996) 13 C4th 622, 726, 55 CR2d 26; *People v Crittenden* (1994) 9 C4th 83, 150, 36 CR2d 474.

The manner of carrying out this function differs distinctly from most reviews of evidence. Here the judge independently reweighs the evidence. For discussion of the reweighing process, see §99.133; for discussion of what evidence the judge considers, see §§99.134–99.139.

### b. [§99.133] Independent Reweighing

In deciding whether the evidence supports the death penalty verdict, the judge “independently” reweighs the evidence of aggravating and mitigating circumstances and then uses his or her “independent judgment.” *People v DePriest* (2007) 42 C4th 1, 56, 63 CR3d 896; *People v Crittenden* (1994) 9 C4th 83, 150, 36 CR2d 474.

The court does not determine de novo whether the death penalty is appropriate. *People v Guerra* (2006) 37 C4th 1067, 1163, 40 CR3d 118; *People v Alvarez* (1996) 14 C4th 155, 285, 58 CR2d 385. However, the court gives the evidence the weight it believes proper and determines whether it supports the jury’s verdict. See, e.g., *People v Guerra*, *supra*; *People v Marshall* (1990) 50 C3d 907, 942, 269 CR 269. This process requires that the judge determine the credibility of the witnesses, assess the probative force of testimony, and weigh the evidence anew. *People v Rodriguez* (1986) 42 C3d 730, 793, 230 CR 667; see *People v Espinoza* (1992) 3 C4th 806, 830, 12 CR2d 682.

#### ☛ JUDICIAL TIPS:

- It is inappropriate to tell the jury before the modification hearing that its verdict is correct. *People v Farnam* (2002) 28 C4th 107, 193–194, 121 CR2d 106.
- Two mistakes to avoid are ruling on the basis of what the judge would have done if he or she had made the penalty determination initially, and denying the motion on the ground that evidence the jury could have believed amply supports its verdict. As to the latter, see *People v Burgener* (2003) 29 C4th 833, 891, 129 CR2d 747.
- It is wise to use a reasonable doubt standard in areas in which the jury had to use it (e.g., other violent crimes), in light of the fact that

the California Supreme Court has not decided this issue. See *People v Williams* (1988) 44 C3d 883, 971 n51, 245 CR 336.

- Don't say you need to determine whether the evidence presented was not correct. Such a statement is not fatal, but it's confusing. See *People v Carrington* (2009) 47 C4th 145, 201, 97 CR3d 117.

### c. Evidence

#### (1) [§99.134] General Rule

In deciding the modification motion, the court may consider only evidence that was properly before the jury (see, e.g., *People v Burgener* (2003) 29 C4th 833, 888, 129 CR2d 747; *People v Bradford* (1997) 15 C4th 1229, 1381, 65 CR2d 145), “no more, no less” (*People v Ashmus* (1991) 54 C3d 932, 1006, 2 CR2d 112).

#### ☛ JUDICIAL TIPS:

- The statement of reasons should make clear that the judge understands and follows this principle. This will help in evaluating contentions on appeal that the trial judge impermissibly considered other matters. See *People v Sanders* (1995) 11 C4th 475, 566, 46 CR2d 751; *People v Ashmus*, *supra*, 54 C3d at 1007–1008.
- The judge should not permit presentation of additional evidence. *People v Sheldon* (1994) 7 C4th 1136, 1140, 31 CR2d 368.

#### (2) [§99.135] Probation Report

The court may not consider a postverdict probation report (or any other probation report that was not before the jury). See, e.g., *People v Nakahara* (2003) 30 C4th 705, 723, 134 CR2d 223; *People v Williams* (1997) 16 C4th 153, 282, 66 CR2d 123.

- ☛ JUDICIAL TIP: When sentencing is set for the same day as the hearing of the motion, it is preferable to defer reading the report until after ruling on the modification motion. *People v Alvarez* (1996) 14 C4th 155, 245, 58 CR2d 385; *People v Lewis* (1990) 50 C3d 262, 287, 266 CR 834; see *People v Coddington* (2000) 23 C4th 529, 644, 97 CR2d 528, overruled on other grounds in 25 C4th 1046, 1069 n13. However, that necessitates a recess while anxious and tense family members wait for sentencing. Many judges read the report before starting court, but announce that they are not considering it in deciding the motion. See *People v Scott* (1997) 15 C4th 1188, 1225–1226, 65 CR2d 240 (judge stated he would only consider matters in the report favorable to defendant). Even without such an announcement, the court on appeal will not assume that the trial judge was improperly

influenced by the report. See, e.g., *People v Welch* (1999) 20 C4th 701, 775, 85 CR2d 203; *People v Williams*, *supra*. Other judges take a recess to read the report; in their experience, this can usually be done fairly quickly.

### (3) [§99.136] Statements by Family Members

The court may not consider statements by victim's (or defendant's) family members or friends other than their testimony during the trial. *People v Rogers* (2006) 39 C4th 826, 907, 48 CR3d 1; *People v Hinton* (2006) 37 C4th 839, 914, 38 CR3d 149.

#### ☛ JUDICIAL TIPS:

- Correspondence received by the judge poses problems analogous to probation reports. Some judges state on the record that they have not considered any letters in deciding the motion. See *People v Osband* (1996) 13 C4th 622, 726–727, 55 CR2d 26. Considering correspondence is improper. [Pen C §1204](#).
- Some judges inform family members who are present in court that they will have an opportunity to speak before sentencing.

### (4) [§99.137] Lack of Remorse

The court may not consider post-offense remorselessness as an aggravating circumstance. See *People v Crittenden* (1994) 9 C4th 83, 150–151, 36 CR2d 474; [§99.29](#). But see *People v Marshall* (1996) 13 C4th 799, 865, 55 CR2d 347. The court may consider remorseless conduct at or near the scene of the offense as a circumstance of the crime. *People v Crittenden*, *supra*.

### (5) [§99.138] Defendant's Courtroom Behavior

Defendant's misbehavior in the courtroom is not a statutory aggravating factor and should not be considered. See *People v Arias* (1996) 13 C4th 92, 192, 51 CR2d 770.

- ☛ JUDICIAL TIP: It is best not to comment on this matter at all. If the judge feels impelled to do so, he or she should be careful to separate the remarks from the evaluation of the modification motion. See *People v Arias*, *supra*.

Calm behavior may be considered as a mitigating circumstance. *People v Williams* (1988) 44 C3d 883, 971, 245 CR 336.

### (6) [§99.139] Absence of Mitigating Evidence

The court should not consider the absence of mitigating circumstances as aggravating, nor treat as aggravating factors that can only mitigate. See *People v Carpenter* (1997) 15 C4th 312, 423, 63 CR2d 1; *People v Kelly* (1990) 51 C3d 931, 971, 275 CR 160; §99.3. Defendant's capacity to know right from wrong does not aggravate the offense. *People v Nakahara* (2003) 30 C4th 705, 725, 134 CR2d 223.

### 3. [§99.140] Matters Not To Be Considered

In deciding the motion, the judge shall not consider:

- The fact that the jury heard improper evidence.
- Concern that the jury could not follow the instruction to disregard such evidence.
- The likelihood of reversal.
- The possibility of another penalty phase trial. *People v Burgener* (1990) 223 CA3d 427, 434–435, 272 CR 830.
- Contrasts between the case at hand and other capital cases that the judge has tried. *People v Crew* (1991) 1 CA4th 1591, 1600, 2 CR2d 755; for discussion of proportionality review, see §§99.146–99.149.

The court may address the first two of these matters on posttrial motions for a mistrial or for a new trial. See *People v Burgener, supra*, 223 CA3d at 436.

### 4. Statement of Reasons

#### a. [§99.141] Specificity

The trial judge must set forth the reasons for the ruling “with sufficient particularity to allow effective appellate review.” *People v Proctor* (1992) 4 C4th 499, 551, 15 CR2d 340; *People v Kelly* (1990) 51 C3d 931, 970, 275 CR 160. For an illustrative statement of reasons, see sample form in §99.164.

It is *not* sufficient simply to state that the court has considered the arguments of counsel, all the evidence and the aggravating and mitigating circumstances, that the former outweigh the latter, and that the weight of the evidence supports the jury's verdict of death. *People v Rodriguez* (1986) 42 C3d 730, 793, 230 CR 667; see *People v Proctor, supra*, 4 C4th at 552.

Statements usually include considerable detail. See, e.g., *People v Koontz* (2002) 27 C4th 1041, 1091–1093, 119 CR2d 859 (extensive memorandum by trial judge that *inter alia* reviewed three prior violent

acts, determining one to be substantially aggravating, another less so, and the third not at all); *People v Osband* (1996) 13 C4th 622, 725, 55 CR2d 26; *People v Ray* (1996) 13 C4th 313, 360–361, 52 CR2d 296. However, the trial judge need not recite every bit of evidence, only that which the judge considers substantial or persuasive. See, e.g., *People v Samayoa* (1997) 15 C4th 795, 860, 64 CR2d 400; *People v Arias* (1996) 13 C4th 92, 192, 51 CR2d 770. The judge also need not discuss each relevant mitigating circumstance. *People v Seaton* (2001) 26 C4th 598, 694, 110 CR2d 441.

➡ JUDICIAL TIPS:

- A good statement of reasons clearly reflects a reweighing of the evidence.
- The statement should not treat the absence of a mitigating factor as aggravating. See §99.139. When the statement refers to an absent circumstance, it helps to add that the court does not view the absence as aggravating.
- It is useful to guard against comments that are not essential to deciding the motion because this is a tense time for everyone in the court.
- For referring to the probation report, see §99.135.

**b. [§99.142] Preparation**

Many judges prepare a tentative written statement; some only state their reasons orally.

➡ JUDICIAL TIPS:

- Advance preparation is not only permissible (*People v Jackson* (2009) 45 C4th 662, 696, 88 CR3d 558; *People v Richardson* (2008) 43 C4th 959, 1033–1034, 77 CR3d 163), but most judges view it as essential.
- Use of a written statement drafted in advance by the prosecutor is permissible (*People v Jackson, supra*; *People v Dennis* (1998) 17 C4th 468, 550, 71 CR2d 680), but most judges consider it wiser to prepare their own or to use drafts by counsel only as a starting point.
- The major advantages of a written statement are that it guards against inadvertent omission of significant evidence that affects the decision and that it avoids the difficulty of working “off the cuff,” even with notes, in a tense atmosphere. The disadvantage, especially if there are no briefs, is that it leads to contentions that the judge decided the motion without considering counsels’ views.

- A judge who makes an oral statement should speak from notes or an outline.

**c. [§99.143] Entry in Minutes**

The judge should order that the reasons for the denial of the motion be entered in the clerk’s minutes. [Pen C §190.4\(e\)](#). For sample form, see [§99.164](#), last paragraph.

**5. Other Matters**

**a. [§99.144] Effect of Jury Waiver**

It is an open question whether [Pen C §190.4\(e\)](#) applies to defendants who waived a jury for the penalty phase. *People v Scott* (1997) 15 C4th 1188, 1225, 65 CR2d 240. The statute is ambiguous. *People v Scott*, *supra*; *People v Diaz* (1992) 3 C4th 495, 575 n34, 11 CR2d 353.

However, *Diaz* suggests that a [Pen C §190.4\(e\)](#) statement of reasons helps the reviewing court when the penalty determination was made by the trial court sitting without a jury. Accordingly, most judges hear and rule on a modification motion even when the jury has been waived.

**b. [§99.145] Unavailability of Trial Judge**

When the trial judge is unavailable, another judge may hear the motion. *People v Espinoza* (1992) 3 C4th 806, 830, 12 CR2d 682.

**B. [§99.146] Motion for Proportionality Review**

In addition to the automatic motion, defendants often seek reduction of the sentence—or of the first degree murder conviction—on one or more of the following grounds:

- That the sentence is disproportionately severe compared with penalties imposed on defendants in other cases who committed similar crimes. See [§99.147](#).
- That the sentence is disproportionate to the sentences of codefendants. See [§99.148](#).
- That the sentence is disproportionate to defendant’s culpability. See [§99.149](#).

The first claim seeks what cases sometimes call “intercase” proportionality review; the second and third requests are for “intracase” review. See, e.g., *People v Howard* (1988) 44 C3d 375, 444, 243 CR 842. Proportionality review requests are not limited to capital cases (see, e.g., *People v Panizzon* (1996) 13 C4th 68, 86, 51 CR2d 851), but are frequently made in them and are briefly discussed in [§§99.147–99.149](#).

## 1. [§99.147] Intercase Review

California courts do not undertake any review of defendant's sentence based on comparing it with sentences in other cases. See, e.g., *People v Wilson* (2008) 43 C4th 1, 30, 73 CR3d 620; *People v Melton* (1988) 44 C3d 713, 771, 244 CR 867. See *Pulley v Harris* (1984) 465 US 37, 104 S Ct 871, 79 L Ed 2d 29 (Eighth Amendment does not require intercase proportionality review).

☛ JUDICIAL TIP: A motion for intercase review should be denied out of hand.

## 2. Intracase Review

### a. [§99.148] Based on Sentence(s) of Codefendant(s)

Recent decisions disapprove intracase review based on sentences of codefendants. *People v Howard* (2010) 51 C4th 15, 39–41, 118 CR3d 678 (fact that actual killer got LWOP not relevant); *People v Box* (2000) 23 C4th 1153, 1219, 99 CR2d 69; *People v Jackson* (1996) 13 C4th 1164, 1246, 56 CR2d 49. On appeal, however, a defendant is entitled on request to intracase review to determine whether the sentence is grossly disproportionate to his or her personal culpability. *People v Anderson* (2001) 25 C4th 543, 602, 106 CR2d 575; *People v Ayala* (2000) 23 C4th 225, 304, 96 CR2d 682.

### b. [§99.149] Based on Individual Culpability: *Dillon* Motion

Defendant is entitled to have the court determine whether the death penalty or first degree murder conviction is grossly disproportionate to defendant's personal culpability. See, e.g., *People v Hines* (1997) 15 C4th 997, 1078, 64 CR2d 594; *People v Arias* (1996) 13 C4th 92, 193, 51 CR2d 770. An early decision recognizing the right to such a determination is *People v Dillon* (1983) 34 C3d 441, 477–489, 194 CR 390; hence the name “*Dillon* motion.”

Another way to state the gross disproportionality test is to ask whether the death sentence shocks the conscience or offends fundamental notions of human dignity. *People v Scott* (1997) 15 C4th 1188, 65 CR2d 240; *People v Hines*, *supra*.

In deciding the motion, the court should consider the circumstances of the crime, including motive, defendant's degree of involvement, the manner of commission, and the results of the defendant's acts. The personal characteristics of the defendant, including age, prior criminality, and mental capabilities should also be scrutinized. *People v Rogers* (2006) 39 C4th 826, 895, 48 CR3d 1; *People v Lucero* (2000) 23 C4th 692, 739, 97 CR2d 871; *People v Hines*, *supra*.

- JUDICIAL TIP: The court will have considered all these matters in connection with the automatic motion to modify (see §§99.131–99.145), which many judges hear at the same time as the *Dillon* motion. Some judges take up the *Dillon* motion during the sentencing hearing.

*Dillon* motions are very rarely granted either by the trial court or on appeal. Summary dispositions of such motions are frequent. See, e.g., *People v Ramos* (Ramos III) (1997) 15 C4th 1133, 1182, 64 CR2d 892; *People v Marshall* (1996) 13 C4th 799, 865, 55 CR2d 347 (“we find no discrepancy on this record and therefore deny the claim”); *People v Wright* (1990) 52 C3d 367, 449, 276 CR 731; see also *People v Scott*, *supra*, 15 C4th at 1227 (medical malpractice that contributed to victim’s death does not make death sentence disproportionate); *People v Jones* (1997) 15 C4th 119, 194, 61 CR2d 386, overruled on other grounds in 17 C4th 800, 823 n1 (death sentence of defendant who was severely mentally ill when he committed homicides not disproportional).

- JUDICIAL TIP: Most judges do not give a statement of reasons in ruling on a *Dillon* motion; it is wise, however, to make clear on the record that the court has considered all the factors referred to in *People v Hines*, *supra*. In the rare case in which the motion is granted, a statement of reasons assumes much greater practical importance.

### C. [§99.150] Request To Strike Special Circumstance

When a special circumstance has been admitted or found to be true, a judge has no authority to strike or dismiss it. [Pen C §1385.1](#). This limitation has its origin in [Proposition 115](#) and therefore does not apply to crimes committed before its effective date, June 6, 1990. *Tapia v Superior Court* (1991) 53 C3d 282, 298, 279 CR 592. It is undecided but doubtful whether the court has power to dismiss a special circumstance even as to a pre-[Proposition 115](#) murder. See *People v Cooper* (1991) 53 C3d 771, 849, 281 CR 90.

### D. [§99.151] Motion for New Trial or Arrest of Judgment

New trial motions are commonly made in capital cases. See [Pen C §§1179–1182](#); for discussion, see 6 Witkin & Epstein, *California Criminal Law, Criminal Judgment* §§90–125 (3d ed 2000).

- JUDICIAL TIP: Many judges set this motion for the same day as the automatic application for modification, other posttrial motions, and sentencing. Judges usually rule on the motion for new trial before taking up modification and disproportionality review because granting the former moots the latter. In any event,

rule on the new trial motion before pronouncing judgment. [Pen C §1202](#); see *People v Braxton* (2004) 34 C4th 798, 805, 22 CR3d 46.

When the new trial motion includes an ineffective-assistance-of-counsel claim, it may be necessary to appoint a new defense attorney to prepare and present the motion. *People v Bolin* (1998) 18 C4th 297, 346, 75 CR2d 412 (test is colorable claim of inadequacy of counsel as to matters that occurred outside the courtroom).

For a motion based on juror misconduct, defendant may be entitled to access to jury questionnaires. See *Zamudio v Superior Court* (1998) 64 CA4th 24, 74 CR2d 765.

For motions in arrest of judgment, see [Pen C §§1185–1188, 1200, 1201\(b\)](#); 6 Witkin & Epstein, California Criminal Law, *Criminal Judgment* §§132–134 (3d ed 2000).

## E. Sentencing

### 1. [§99.152](#) In General

Sentencing procedures in capital cases are much like those in other felony cases. For death sentence script, see spoken form in [§99.163](#); for commitment, see [§99.153](#). The defendant has no right to make an unsworn statement in mitigation of punishment. *People v Evans* (2008) 44 C4th 590, 80 CR3d 174 (noncapital case).

#### ☛ JUDICIAL TIPS:

- Sentencing hearings in capital cases are often especially tense and emotional. Extra security personnel should be present. Persons in the courtroom should be firmly admonished against making audible comments.
- The court should also sentence on noncapital counts and enhancements. Sentences on such counts do not merge into the death sentence, and they play an important role in the event the death sentence is reversed.
- Some judges remain in the courtroom after sentencing to talk briefly with persons who are present. However, some judges note that speaking about the case itself would be improper because it is automatically on appeal. Many judges leave the courtroom immediately after sentencing the defendant.

### 2. [§99.153](#) Commitment

The judge signs a commitment order, directed and delivered to the sheriff, that:

- States the conviction and judgment, and
- Directs the sheriff to deliver the defendant within ten days from the time of judgment to the warden of San Quentin for execution of the death penalty, to be held pending the decision of defendant's appeal. See [Pen C §1217](#).

#### F. [§99.154] Preparation and Certification of Record

Trial court judges have extensive responsibilities for the timely certification of the record on appeal. [Pen C §§190.7–190.9](#); [Cal Rules of Ct 8.600–8.622](#). For extensive coverage of this topic see Supreme Court of California Office of the Clerk/Administrative Office of the Courts, *Death Penalty Appeals: Preparation and Certification of the Record*. Detailed strict time limits apply.

- ✎ JUDICIAL TIPS: (1) It is important to follow the time constraints meticulously to reduce posttrial delay. See [Pen C §190.8\(h\)](#) (Supreme Court reports cases that do not meet time limits to Legislature).
- (2) Judges may locate the SC/AOC manual at the Serranus website: <http://serranus.courtinfo.ca.gov/reference/documents/dpmanual.pdf>.

#### G. [§99.155] Reimposition of Sentence After Appeal; Setting Execution Date

When the California Supreme Court affirms a death sentence, the trial court reimposes the sentence and sets an execution date without delay for further appellate proceedings. [Pen C §1193\(a\)](#); [Cal Rules of Ct 4.315](#); *People v Superior Court (Gordon)* (1990) 226 CA3d 901, 903, 277 CR 321.

The trial court does this at a hearing at which defendant does not have the right to be present. [Cal Rules of Ct 4.315\(a\)](#). The execution should be set for a day 60 to 90 days after the hearing date. [Pen C §1193\(a\)](#). For notice of the hearing and of the execution date, see [Cal Rules of Ct 4.315\(a\)–\(b\)](#).

##### ✎ JUDICIAL TIPS:

- Do not set execution date unless the district attorney requests it. This will avoid unnecessary stay applications to the California Supreme Court.
- Do not grant requests for stays. Counsel should seek them from the appellate court. For dealing with insanity questions after an execution date has been set, see [Pen C §§3700–3704.5](#); 6 Witkin & Epstein, California Criminal Law, *Criminal Judgment* §§172–173 (3d ed 2000).

## H. Postconviction Discovery

### 1. [§99.156] Proceedings in Which Available; Venue

Discovery is available under certain circumstances (§99.157) to defendants under sentence of death or LWOP who are preparing to file or have filed a petition for writ of habeas corpus or motion to vacate the judgment. [Evid C §1054.9\(a\)](#); *In re Steele* (2004) 32 C4th 682, 688, 691, 10 CR3d 536.

The discovery motion should be filed in the trial court that rendered the judgment. 32 C4th at 688–692. As to postconviction defense motions for DNA testing, see [Pen C §1405](#); *Richardson v Superior Court* (2008) 43 C4th 1040, 77 CR3d 226.

Untimeliness is not a ground for denying postconviction discovery. *Catlin v Superior Court* (2011) 51 C4th 300, 120 CR3d 135.

### 2. [§99.157] Discoverable Matters

Discovery under [Evid C §1054.9](#) includes and is limited to materials that (*In re Steele* (2004) 32 C4th 682, 688, 10 CR3d 536)

- are currently in the possession of the prosecution or [California](#) law enforcement authorities (*Barnett v Superior Court* (2010) 50 C4th 890, 894, 901–906, 114 CR3d 576 ([Evid C §1054.9](#) generally does not apply to materials in the possession of out-of-state law enforcement agencies that merely gave the prosecution information or assistance)) and
- the defendant can show fall into any *one* of the following categories:
  - (1) matters previously provided but that have since become lost to the defendant; *or*
  - (2) matters the prosecution should have provided at trial; *or*
  - (3) matters the defendant would, upon request, have been entitled to at trial.

The third category includes evidence of defendant’s behavior in prison. 32 C4th at 698–702 (potentially mitigating evidence would have been discoverable at trial upon request).

### 3. [§99.158] Showing


The defendant must show a reasonable belief that specific requested materials actually exist, but need not also show that they are material. *Barnett v Superior Court* (2010) 50 C4th 890, 894, 897–901, 114 CR3d 576.

#### 4. [§99.159] Review

Either party may challenge the ruling on the discovery motion by a petition for writ of mandate in the court of appeal. *In re Steele* (2004) 32 C4th 682, 688, 692, 10 CR3d 536. A reviewing court should deny without prejudice a discovery motion under Evidence Code §1054.9 that was not first filed in the trial court. 32 C4th at 692.

#### I. [§99.160] Postconviction Mental Retardation Hearing

The trial court hears mental retardation claims that the defendant raises after conviction substantially in accord with Pen C §1376. *In re Hawthorne* (2005) 35 C4th 40, 44, 24 CR3d 189; see California Judges Benchguide 98: *Death Penalty Benchguide: Pretrial and Guilt Phase* §§98.20–98.30. The matter is decided by the judge, not by a jury. 35 C4th at 49; *People v Jackson* (2009) 45 C4th 662, 679, 102 CR3d 331.

 JUDICIAL TIP: When defendant has raised retardation as a mitigating factor during the trial, do not let that prevent a posttrial hearing on the separate issue of whether the defendant is so retarded that he cannot be executed. See *Bobby v Bies* (2009) \_\_ US \_\_, 129 S Ct 2145, 173 L Ed 2d 1173.

#### J. Claims Based on International Law

##### 1. [§99.161] Vienna Convention on Consular Rights

This Convention requires law enforcement officers to inform arrested foreign nationals without delay of their rights to communicate with an official of their country's consulate and to have the consulate notified of their arrest. Vienna Convention on Consular Rights, art 36(1)(b); see *People v Mendoza* (2007) 42 C4th 686, 709, 68 CR3d 274. The convention has given rise to the following:

(1) *Ratification*. It was ratified by the U.S. in 1969. See 42 C4th at 709.

(2) *Penal Code §834c*. California enacted Pen C §834c in 1999, which carries the requirements of the Convention into state law.

(3) *Avena*. In *Case Concerning Avena and Other Mexican Nationals (Mexico v U.S.)* 2004 ICJ 12, the International Court of Justice held in 2004 that the U.S. had violated the Convention by failing to inform the named Mexican nationals of their Vienna Convention rights—that the convictions need not be annulled but that American courts must review them to determine whether the violations caused actual prejudice. See *People v Mendoza, supra*, 42 C4th at 709–710; *Medellin v Texas* (2008) 552 US 491, 128 S Ct 1346, 1354–1355, 170 L Ed 2d 190, subsequent opinion 554 US 759, 129 S Ct 360, 171 L Ed 2d 833.

(4) *President's Memorandum*. In 2005 President Bush issued a memorandum to the U.S. Attorney General stating that the United States would discharge its international obligation by having state courts give effect to *Avena*. *People v Mendoza*, *supra*, 42 C4th at 700.

(5) *Withdrawal of Consent*. Also in 2005, the U.S. withdrew its consent to the jurisdiction of the International Court of Justice over disputes regarding the Vienna Convention See *Medellin v Texas*, *supra*, 128 S Ct at 1354.

(6) *Mendoza*. In *Mendoza*, the California Supreme Court held that even assuming defendant's consular rights were violated, he had not shown prejudice. 42 C4th at 711.

(7) *Medellin*. In *Medellin*, the U.S. Supreme Court held that the *Avena* judgment is not binding domestically in the absence of Congressional enabling legislation (128 S Ct at 1357–1358) and that the President had no authority to issue the memorandum. 128 S Ct at 1367–1375. In accord: *In re Martinez* (2009) 46 C4th 945, 949, 95 CR3d 570.

#### *Suggestions for Trial Judges*

- Treat the matter under [Pen C §834c](#).
- Provide an opportunity to make a full record.
- Determine whether [Pen C §834c\(a\)\(1\)](#) was violated.
- If so, determine whether defendant has shown that the violation prejudiced him or her. Was defendant denied any of the things the consulate could have provided? Did any such denial prejudice the defendant? See *People v Mendoza*, *supra*, 42 C4th at 711.

## 2. [§99.162] Other Claims

Other provisions of international law do not bar a death sentence rendered in accord with state and federal law. *People v Rogers* (2009) 46 C4th 1136, 1181, 95 CR3d 652 (when a death sentence complies with state and federal constitutional requirements, international law is not violated); *People v Lewis* (2008) 43 C4th 415, 539, 75 CR2d 588. This includes, *e.g.*,

- The [International Covenant on Civil and Political Rights](#). *People v Mungia* (2008) 44 C4th 1101, 1143, 81 CR3d 614; *People v Lewis*, *supra*.
- Extradition treaties. *People v Salcido* (2008) 44 C4th 93, 122–127, 79 CR3d 54; see *U.S. v Alvarez-Machain* (1992) 504 US 655, 112 S Ct 2188, 119 L Ed 2d 441 (Mexican national forcibly abducted in Mexico by DEA, in violation of treaty, may be prosecuted despite protest by Mexican government).

- The widespread abolition of the death penalty throughout the world does not mean that the California death penalty law violates international norms of human decency and hence the [Eighth Amendment](#). *People v Salcido*, *supra*, 44 C4th at 168; *People v Brasure* (2008) 42 C4th 1037, 1071, 71 CR3d 675.

#### IV. FORMS

##### A. [§99.163] Spoken Form: Death Sentence Script

Is there any legal cause why sentence of judgment should not now be imposed?

*[Defense counsel responds:]*

There is none, your Honor.

Do you waive arraignment for judgment and sentence?

*[Defense counsel responds:]*

So waived.

The record should reflect that I have read and considered a probation report dated \_\_\_\_, and consisting of \_\_\_\_ pages, only on the nondeath count(s).

*[Name of defendant]*, for the offense of murder of *[name of victim]* as charged in Count I of the *[information/indictment]* of which you were previously found guilty, the *[jury/court]* having found the offense of murder to be of the first degree and the jury having found that the special circumstance[s] of *[describe]* alleged in the *[information/indictment]* under California [Penal Code section 190.2](#), subdivision[s] \_\_\_\_, *[was/were]* true, and the jury having previously found that the penalty shall be death, and this court having denied your motions for a new trial, for modification of the verdict, and *[add any other motions]*, it is the judgment and order of this court that you shall suffer the death penalty, said penalty to be inflicted within the walls of the state prison at San Quentin, California, in the manner prescribed by law and at a time to be fixed by this court in the warrant of execution.

*[Sentence on other death count(s).]*

*[Sentence on nondeath count(s). (Add if appropriate:)]*

The court specifically orders that the service of the additional years of imprisonment on Count[s] \_\_\_\_ be stayed and not served by the defendant because of the fact that the court relied on the facts underlying *[this/these]* offense[s] to deny the motion to modify the death penalty.

Said stay shall be during the pendency of the appeal on Count(s) \_\_\_\_\_ and shall become permanent when the sentence on Count[s] \_\_\_\_\_ is completed.

You are remanded to the care, custody, and control of the sheriff of \_\_\_\_\_ County, to be delivered by him or her to the warden of the state penitentiary at San Quentin, California, within ten days from the date hereof, in the usual course of his or her duties, for the execution of the sentence[s] on the offense[s] of murder in the first degree contained in Count[s] \_\_\_\_\_ of the information of which you have been found guilty and the special circumstance[s] having been found to be true, to be held by the warden pending the final determination of your appeal in this matter, which is automatic, under [Penal Code section 1239\(b\)](#), said sentence[s] to be executed on such final determination of the appeal, and you are to be held by the warden during said period of time until further order of this court. It is so ordered.

Therefore, this is to command you, the sheriff of the County of \_\_\_\_\_, as provided in said judgment, to take [*name of defendant*] to the state prison of the state of California at San Quentin, California, and deliver [*him/her*] into the custody of the warden of said state prison.

Further, this is to command you, the warden of the state prison of the state of California, at San Quentin, California, to hold in your custody the said [*name of defendant*] pending the decision of this cause on appeal and on this judgment becoming final, to carry into effect the judgment of this court within the state prison at the time and on a date to be hereafter fixed by order of this court, at which time and place you shall put to death the said [*name of defendant*] in the manner prescribed by law.

The defendant's appeal rights are automatic to the California Supreme Court.

This is the order of the court. We shall now be in recess.

**B. [§99.164] Sample Form: Automatic Motion To Modify Death Verdict—Statement of Reasons in an Actual Case**

Pursuant to [Penal Code section 190.4\(e\)](#), there is an automatic motion for reduction of the jury determination of penalty from death to life imprisonment without parole, under [Penal Code section 1181\(7\)](#). In this regard, I have made an independent determination of the propriety of the penalty and have made an independent review of the weight of the evidence relating thereto, within the meaning of and pursuant to the dictates of *People v Lang* (1989) 49 C3d 991, 1045, 264 CR 386; *People v Rodriguez* (1986) 42 C3d 730, 793–794, 230 CR 667, and their progeny. In light of the above, the motion for modification of the penalty

from death to life imprisonment without parole is denied for the following reasons:

I have carefully and independently weighed, considered, taken into account, and was guided by the aggravating and mitigating factors set forth in [Penal Code section 190.3](#) and as interpreted by the higher courts. In this regard, I note and find the following: I find that the first degree murder of \_\_\_\_\_ was an intentional killing personally committed by the defendant, \_\_\_\_\_, and I further find that the murder was premeditated, willful, and committed with malice aforethought. If these findings should be required under any constitutional or other mandate, as well as [Penal Code section 190.4\(e\)](#), I so find them under [Cabana v Bullock \(1986\) 474 US 376, 106 S Ct 689, 88 L Ed 2d 704](#). I further find that this cold, vicious murder was committed in the course of the victim, \_\_\_\_\_, being brutally raped, sodomized, and strangled by \_\_\_\_\_ and that such killing took place to prevent her from identifying him.

Relative to the above, I note the following as to the circumstances of the crimes of which the defendant was convicted in the present proceeding:

That on \_\_\_\_\_ of 201\_, \_\_\_\_\_ raped a pregnant teenage girl, \_\_\_\_\_, who had taken shelter in his residence, knowing that she was with child at the time; and that on \_\_\_\_\_ of 201\_, he brutally raped and sodomized \_\_\_\_\_, and strangled her so that she would not be able to identify him or testify against him.

In addition I note, relative to criminal activity committed by the defendant which involved the use of force or violence, the following: that while in \_\_\_\_\_, \_\_\_\_\_ repeatedly over a lengthy period of time forcibly sodomized his own stepdaughter and his own natural biological daughter, very young children, bringing about screams of agony, threatening death if they told anyone, thus causing them to live in fear of their own father, and further that he assaulted his ex-wife in \_\_\_\_\_ on different occasions with varied deadly weapons and/or great force.

I have carefully considered every possible mitigating factor, and all possible mitigating evidence, including, but not necessarily limited to: the absence of felony or misdemeanor convictions, the fact that \_\_\_\_\_ had a history of alcoholism, the fact that in spite of being illiterate, he was able to become an expert \_\_\_\_\_ and support a family, and the fact that \_\_\_\_\_ has not been a problem while in custody awaiting trial. However, I find the mitigating circumstances are substantially outweighed by the revolting circumstances of not only the rape, sodomy, and murder of \_\_\_\_\_ but also the repulsive crimes of violence that have been described, perpetrated on other helpless victims, which clearly establish that the defendant was acting as a savage brute in committing these

reprehensible offenses, who satisfied his lust and anger on those weaker than himself.

I have painstakingly and carefully weighed and considered the aggravating and mitigating factors as set forth in [Penal Code section 190.3](#), and I find that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

These reasons for denial of the application for modification are ordered to be entered in the clerk's minutes.

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